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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No.

NORTHWESTERN PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

JOSEPHINE BOBO, AS ADMINISTRATRIX OF THE ESTATE OF PERRY E. BOBO, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

INDEX

	Original	Print
Record from district court of appeal of California, first appellate district	1	1
Caption (omitted in printing)	3	
Record from superior court of Marin County	4	1
Complaint	4	1
Summons and return	8	3
Answer	10	4
Verdict	14	7
Judgment	14	7
Notice of motion for new trial	16	8
Minute entry of submission	18	9
Order on motion for new trial	18	9
Notice of denial of motion for new trial	19	9
Consent to reduction of judgment	20	10
Notice of appeal	21	10
Notice to clerk to prepare transcript	22	11

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 26, 1933

	Original	Print
Clerk's certificate	24	11
Statement of evidence	25	12
Colloquy	27	12
Testimony of Mrs. Josephine Bobo	28	13
Dr. J. H. Kuser	34	20
Elwood Bobo	38	23
Fabian Bobo	38	24
Fred De Lucca	39	25
E. L. Lowe	58	42
John Lee Bobo	67	49
Thomas B. Adge	68	51
Michael Campbell	70	53
Colloquy	81	62
Testimony of Charles Munz	82	63
Michael Campbell (recalled)	86	66
Edward G. Sheibley	92	71
Defendant's motion for non-suit	112	87
Testimony of Herbert I. Benjamin	114	89
Michael Campbell (recalled)	119	93
E. L. Lowe (recalled)	121	94
Lucius J. Kohl	125	99
Charge to jury	128	101
Reporter's certificate (omitted in printing)	140	
Judge's certificate	141	110
Opinion by the court	142	111
Order denying petition for rehearing	149	115
Order of supreme court denying petition for hearing	150	115
Judgment	151	116
Stipulation as to transcript of record	152	116
Plaintiff's Exhibits 1 to 3—Photographs	156a	118
Clerk's certificate (omitted in printing)	157	
Order allowing certiorari		119

Q. All right. We will offer that in evidence and ask it be marked——

The Court: Wait a minute; you had better have it marked; marked for identification.

Mr. Palmer: Just a minute; before you show it to the jury, have it marked and introduced.

[fol. 32] The Court: Why not have it in evidence?

Mr. Duke: All right, mark it in evidence.

The Court: As a picture of the house as it was on that evening.

Mr. Palmer: And we have no objection to it.

The Court: All right (Marked Plaintiff's Ex. No. 1).

Mr. Duke:

Q. That was the house where you accompanied your husband that evening?

A. Yes, sir (Handed to jury).

The Court: I think you may proceed with the examination.

Mr. Duke:

Q. Mrs. Bobo, did your husband have any conversation with you that evening as to what he was going to do the next morning?

A. Yes, sir, they were.

Mr. Palmer: One moment; the answer is "Yes, sir."

Mr. Duke:

Q. Now, Mrs. Bobo, what kind of a husband was Mr. Bobo to you?

A. Very good.

Q. Very good; he was kind and affectionate?

A. He certainly was.

Q. And to your children?

A. Yes, sir.

Q. Was he companionable with the boys?

A. Yes, sir.

Q. Did he help them with their lessons?

A. Yes, sir.

Q. Did he send them to school?
A. He did.
Q. And provided them with school. What salary did he earn?
A. Ninety dollars.

The Court:

Q. A month?
A. Yes, sir.

Mr. Duke:

Q. $90 a month?
A. Months.
Q. How high did he send the boy to school?
A. One is still going to High School; he has another term.
[fol. 33] Q. The younger boy has another term?
A. And the other one went three terms.
Q. And how much money did he contribute to the support of the family?
A. Well, we just had it together.
Q. Say how much, all of his salary?
A. All of it, yes, sir.
Q. All of his salary went to the support of his family?
A. Yes, sir.
Q. He maintained a home for you, did he?
A. Indeed he did.
Q. Always?
A. Yes, sir.
Q. And always was a kind and loving husband?
A. Yes, sir.
Q. And kind and loving father?
A. Yes, sir.
Q. How old was he?
A. 50 years.
Q. 50 years. What was the condition of his health; was he healthy?
A. Yes, sir.
Q. Was he ever sick?
A. No, not to speak of; nothing.
Q. Was he—did he work all the time?
A. He worked all the time.
Q. Never laid off any?

A. Never laid off.

Q. Did he have any days off up there; did he work continually?

A. Yes, sir.

Q. Worked 30 days a month, did he?

A. Yes, sir.

Q. Did he ever lay off for illness?

A. Well, not to speak of.

Q. Do you know whether he did or not?

A. Well, he never laid off, no, not very much. At times anyone is liable to be sick.

Mr. Duke: That is all; take the witness.

[fol. 34] Cross-examination.

Mr. Palmer:

Q. Mrs. Bobo, how long had he been working on that bridge prior to February 4th?

A. He went to work—six months it is.

Q. And had he during all that time worked on the same shift, that is, commencing at nine o'clock at night?

A. Yes, sir.

Q. And his hours commenced at nine o'clock at night and continues until when?

A. Until five in the morning.

Q. Until five in the morning; and when you came there to the bridge that night with him, about what time was it?

A. About ten minutes to nine, I think.

Q. About ten minutes to nine?

A. I think.

Q. Did——

The Court (intg.): Speak a little louder; the jury must hear you.

A. About ten minutes to nine.

Mr. Palmer:

Q. Did he relieve another man on the bridge when he came there?

A. Yes, sir.

Q. Then there are three shifts, or were at that time?

A. Yes, sir.

Q. Three men operating as bridge tenders, eight hours a day each?

A. Yes, sir.

Mr. Palmer: That is all.

Mr. Duke: That is all.

Dr. J. H. KUSER, sworn as a witness for plaintiff, testified as follows:

Mr. Duke:

Q. Your name?

A. Dr. J. H. Kuser.

[fol. 35] Q. Dr. J. H. Kuser; you are a regularly licensed physician and surgeon?

A. I am.

Mr. Duke: You will admit the Doctor's qualifications?

Mr. Palmer: I will.

Mr. Duke:

Q. You are autopsy surgeon of the County of Marin, State of California?

A. I am.

Q. Did you have occasion to perform an autopsy on the body of a man that was drowned along in February?

A. I made a post mortem examination.

Q. A post mortem examination?

A. Yes.

Q. And did you learn at that time that that was Perry E. Bobo?

A. Well, I was told that was what it was; I did not know the man.

Q. What was the cause of his death?

A. Drowning.

Q. Drowning. What was the condition of the body?

A. Well, the body was in a fair state of advanced decomposition.

Q. Did you examine the body as to any marks of physical violence?

A. Well, there were evidences there which might be attributable to the elements, being in the water so long,

washing back and forth and coming up against the rocks or piles or whatever was there.

Q. The body was in such condition you could not state?

A. No, you could not; it would not give you any definite information.

Q. Where did you see the body, Doctor?

A. Up at the morgue.

The Court:

Q. How long after February 3rd, 1930, was it?

A. I saw the body on February 21st.

Q. Eighteen days after?

A. Yes. I made a statement that it was between two and three weeks.

[fol. 36] Mr. Duke:

Q. Did you say how long the body had been in the water?

A. I figured it—in my estimation I figured two or three weeks, considering the state of decomposition.

Mr. Duke: That is all.

Cross-examination.

Mr. Palmer:

Q. Doctor, you said you made a post mortem examination; is that the same as an autopsy, Doctor?

A. Yes, every autopsy is a post mortem examination, but a post mortem examination is not necessarily an autopsy.

Q. In other words, an autopsy is a more thorough examination, you examine very carefully to observe everything that might possibly cause the death?

A. In an autopsy, we open up the cavity to ascertain the cause of death beyond the shadow of a doubt.

Q. But in this case you did not do that?

A. You could not; it would not give you any information.

Q. Then you could not state positively whether or not he might have died of disease or something like that—a stroke, or heart trouble?

A. The condition of the body was such it would not allow you to draw any deduction.

Q. And then you do not want to say now positively that drown*d*ing was the cause of death?

A. That is the most probable.

Q. That is the most probable, that is as far as you could say at this time?

A. As far as I could say.

Mr. Palmer: That is all.

The Court:

Q. Was there something about the condition of his body that would lead you to believe drown*d*ing was a likely [fol. 37] cause?

A. Well, that—there was nothing on the body except it was immensely bloated and the *a*kin was peeling off and as I say, the body——

Q. (Intg.) No, I mean was there anything about the body that would cause you to believe that drown*d*ing was the more probable cause of death than anything else?

A. In the absence of any decided manifestation, like what I said, a broken arm or leg or something like that, because the body was in perfectly normal condition as far as shape was concerned, outside of the bloat.

Q. Was the skin broken in any place?

A. Yes, the skin was mascerated.

Q. In many place-?

A. In many places.

Q. Was there any evidence of violence that you could see?

A. It could not be told. It could not be ascertained. The body was too far gone.

Q. You could not say, Doctor, whether he might have died of heart failure and fallen in the water?

A. The only thing you could do was to open up the body; it would not give you any information. Decomposition was too advanced with body fluids, gases and waste, and it would not give you any information; you could not substantiate it.

The Court: That is all.

Mr. Duke:

Q. In your opinion death was caused by drown*d*ing?

A. It was.

Q. And you signed a certificate to that effect?
A. And I signed a certificate to that effect.

Mr. Duke: That is all.

[fol. 38] Elwood Bobo, sworn as a witness for plaintiff, testified as follows:

Mr. Duke:

Q. What is your name?
A. Elwood Bobo.
Q. And where do you live?
A. Grand View.
Q. How old are you?
A. Twenty.
Q. When were you twenty.
A. September 22nd.
Q. Last September?
A. Last September.
Q. And this is your mother that was just on the stand?
A. Yes, sir.
Q. Perry E. Bobo was your father?
A. Yes, sir.
Q. What kind of a father was he to you?
A. A very good father.
Q. He educated you?
A. Yes, sir.
Q. Was he companionable to you?
A. Yes, sir.
Q. Did he assist you in your work at school?
A. Yes, sir.
Q. And always sent you to school?
A. Yes, sir.

Mr. Duke: That is all.
Mr. Palmer: No questions.
The Court: That is all.

FABIAN BOBO, sworn as a witness for the plaintiff, testified as follows:

Mr. Duke:

Q. Fabian, how old are you?
A. Eighteen.
Q. When were you eighteen?
A. November 10th.
Q. Last November?
A. Yes, sir.
Q. And where do you reside?
A. What?
Q. Where do you reside?
A. Grand View.
[fol. 39] Q. With whom?
A. With my mother.
Q. With your mother. Was Perry E. Bobo your father?
A. Yes, sir.
Q. When did you last see him?
A. February; February the 3rd.
Q. February the 3rd.

The Court: 1930, was it?

Mr. Duke:

Q. 1930?
A. 1930.
Q. A year ago last February?
A. Yes.
Q. And what kind of a father was he to you?
A. He was good.
Q. A good father?
A. Yes, sir.
Q. Kind and affectionate?
A. Yes, sir.
Q. Companionable?
A. Yes, sir.
Q. And did he assist you at your school work?
A. Yes, sir.
Q. And he sent you to school?
A. Yes, sir.
Q. And he provided for the family, your mother, your brother and yourself?

A. Yes, sir.
Q. And he always did that?
A. Yes, sir.
Q. And he worked continuously?
A. Yes, sir.

Mr. Duke: That is all.
Mr. Palmer: No questions.

FRED DELUCCA, sworn as a witness for the plaintiff, testified as follows:

Mr. Duke:

Q. What is your name?
A. Fred DeLucca.
Q. And what is your occupation, Mr. DeLucca?
A. Constable.
Q. And were you such constable in February, 1930?
A. I was.
[fol. 40] Q. Did you have occasion to go to the drawbridge at Grand View?
A. Yes, sir.
Q. Under what circumstances did you go there?
A. I was called about eight o'clock in the morning that Mr. Bobo was disappeared and I went there to investigate and——

Mr. Palmer (intg.): One moment; that is a response to that question. I do not want any volunteer statement.

Mr. Duke:

Q. You went to the bridge, did you?
A. Yes, sir.
Q. All right; when you went to the bridge, what did you do?
A. Well, I talked to Mrs. Bobo, and she said——

Mr. Palmer (intg.): One minute——

Mr. Duke (intg.): Never mind what she said. You found Mr. Bobo was missing?
A. Yes.

Q. Then what did you do?
A. I went to investigate about the stairway.

Mr. Palmer: One moment——

Mr. Duke (intg.): One moment; you went to the bridge, did you?
A. Yes, sir.
Q. Did you take any photographs of that bridge?
A. Yes, I took several.

Mr. Palmer: Are these the ones you want to offer?
Mr. Duke: Yes. Do you object?
Mr. Palmer: If he took them at that time.

Mr. Duke: I will show you these photographs and ask you if you took those photographs?
A. Yes, these are the photographs that I took.
[fol. 41] Q. Show them to the Court. (Examined by the Court.) When were those taken, Mr. DeLucca?
A. The next morning.
Q. You mean next morning, what morning was that?
A. The same morning that he disappeared.
Q. The 4th of February?
A. The 4th of February.
Q. Those portray the places that are exhibited on there?
A. Yes, sir.
Q. And this one, what is that?

A. This is the stairway and the platform.
Q. Stairway to where?
A. To go up to the engine room.
Q. Up to the engine room?
A. Yes.
Q. The engine room is located where—up above the floor of the bridge?
A. Up at the top, yes.

Mr. Duke: I offer that in evidence.
The Court: It might be better to offer them all at once.
Mr. Duke: What does that portray.
A. This is the top platform.
The Court: I would suggest you offer them all at once to be marked, and then as you question the witness you can identify them.

Mr. Duke: All right, we will offer these in evidence, and show them to the jury.

The Court: One exhibit and they will be marked "A," "B," "C" and "D."

Mr. Duke: Yes, "A," "B," "C" and "D."

(Marked "2A, 2B, 2C, 2D.)

Q. Now I show you Plaintiff's Exhibit 2C and ask you what that is?

A. This is one side of the bridge where the—that is the stairway.

[fol. 42] Q. That is the stairway leading from where to where?

A. Leading from the bottom to the top there.

Q. You mean from the floor of the bridge——

A. (Intg.) Yes, from the floor of the bridge.

Q. (Contg.:) To the engine room?

A. To the engine room.

Q. I show you Plaintiff's Exhibit 2-D, and ask you what that is?

A. That is the stairway; the same.

Q. The same thing?

A. The same thing, yes.

Q. That is the same thing, is it not?

A. Yes, sir.

Q. And I ask you what that is?

A. This is the platform at the top of the stairs from—to the engine room.

Q. What is that?

A. The top platform to the engineroom.

The Court: He said it was the platform at the top of the stairs to the engine room.

Mr. Duke:

Q. That is the foot of the stairs, isn't it?

A. Oh, yes.

Q. That is the bottom platform?

A. Yes, there is one on top like this.

Q. That is the foot of the stairs?

A. That is the foot of the stairs, yes.

Q. What is that, that is, 2-B?

A. This is the entrance to the bridge.

Q. Isn't that from the top of the stairs looking down—it looks to me like that?

A. I don't know; yes, that is the top.

Q. Top looking down?

A. Top looking down. I know I took two or three of them.

[fol. 43] Q. Plaintiff's Exhibit 2-B. (Handing Exhibit to Jurors) Now, Mr. DeLucca, I show you Plaintiff's Exhibit 2-A and ask you if you made an examination of the—of this platform at the foot of the stairs?

A. Yes, I did.

Mr. Palmer: Just a moment, let me see what one you refer to. (After examination) May I ask him a question? What are those things that are on the platform, couple of hammers or something?

A. Yes, I think there was a hammer or two that was there.

Mr. Duke: I will ask you if you made an examination of that platform?

A. Yes, I did.

Q. Did you find anything there?

Mr. Palmer: Well, one moment; "Did he find anything there?" I object to the form of that question; ask him what was the condition of the platform.

Mr. Duke:

Q. Well, what was the condition of the platform?

A. The condition was I examined it. When I examined that platform I was looking for marks.

Mr. Palmer: Never mind what you were looking for; just state what you did.

A. I saw there was a spot there and there was some sheepskin hair.

Q. What?

A. Sheepskin; some of the sheep hair.

Q. A spot there with some sheepskin hair on it?

A. Yes, right on the edge of the platform.

Mr. Duke:

Q. What was the nature of that spot, if you know?

A. It looked like blood to me.

Mr. Palmer:

Q. Looked like what?
A. Blood.

The Court:

Q. That platform, of what material was it constructed?
A. Steel.
[fol. 44] Q. Steel?

Mr. Duke:

Q. You say—where was the spot you refer to; just show the jury?
A. Right on this side.
Q. How far from——

Mr. Palmer (intg.): Just a moment.
The Court: Put a mark on it.
Mr. Palmer: Give me a chance to see it.
The Witness: This is the stairs; this is the stairs that lead down, and come out this way.
The Court: Put a pen mark on it, please.

A. Now the spot was right over here.
Q. We are wasting time unless you mark it.
A. I am marking it.
Q. With a pen?
A. No. Here is the spot right here at the edge and the wool was right at the edge of the platform, and the spot looked like blood to me and I believe it was blood, it was a little over to the side.

Mr. Palmer: I ask "It looks like blood to me and I believe it was blood" be stricken out as the conclusion of the witness.
The Court: Oh, I think it may stay in, Mr. Palmer.
Mr. Duke: Referring to Plaintiff's Exhibit 2-A, he has marked the spot where he saw saw the wool. Now where was the wool, Mr. DeLucca?

A. What is that?
Q. Where was the wool you refer to?
A. Right on the edge of the platform.

(Question read.)

Q. Now, Mr. DeLucca, did you see the body when it was recovered?

[fol. 45] A. I did.

Q. Was it—what was the condition of it as to clothes?

A. Clothes? He was dressed with blue overalls and one of these sheepskin coats.

Q. Sheepskin coat?

A. Yes, had sheepskin around the neck.

Q. Sheepskin collar?

A. It was brown coat with sheepskin collar around the neck.

Q. When you examined that bridge—when you examined that platform, that was the following morning?

A. The following morning, yes.

Q. In this picture you show hammers; were those hammers there?

Mr. Palmer: At what time? Of course they were there when the picture was taken.

Mr. Duke: I asked him the next morning, when you first examined the bridge?

A. No, no, they weren't there.

Q. They weren't there?

A. No.

The Court:

Q. What time the next morning was it you examined the bridge?

A. It was around eight o'clock.

Mr. Duke:

Q. Did you see marks on the body?

A. Yes, sir.

Q. Where?

A. Right in the back of the neck, there was a little bruise, bruised spot.

Q. How big was it?

A. Oh, round about couple inches diameter.

Q. Where did you see the body?

A. I saw him when they took him out of the water; I was right there to identify him.

Q. Who was there when you reached the body?

A. Oh, there was several there. There was a son and the undertaker, I think. Mr. Bobo, young Bobo was there.

[fol. 46] The Court:

Q. When you say "the undertaker," give the name, please.

A. I don't just exactly know his name. A tall fellow—William—I know him by sight but I do not know his name. I believe there were two there.

Mr. Duke:

Q. Did you examine the steps of the bridge?

A. I did.

Q. What was the condition?

Mr. Palmer: At what time?

Mr. Duke: Well, he refers to eight o'clock in the morning.

The Court: I think all his testimony refers to the first visit to the ground.

Mr. Palmer: He is now speaking about the body, some two weeks later. I just want to make it clear, that is all.

Mr. Duke:

Q. Did you, on the morning that you first went there, did you examine the steps and platform?

A. I did.

Q. What was their condition?

A. Very slippery.

Q. Very slippery; were there any dents? What was the condition of the surface of the platform and steps?

A. Why, they were slippery; wet, you know, bad condition, and——

The Court:

Q. Of what material were they made?

A. Steel; all steel stairs and a rail on the side.

Mr. Duke:

Q. Were the steps and the platform even or uneven?

A. Well——

Mr. Palmer (intg.): Objected to as leading, if your Honor please; he has asked him what was the condition of the steps and he has already answered it.

[fol. 47] Mr. Duke: All right.

The Court: Will you answer that question?

A. They were even? How do you mean?

Mr. Duke:

Q. What was their condition, were they even or rough?

The Court:

Q. You mean smooth or rough?

Mr. Duke:

Q. Smooth or rough?

A. They were smooth.

Q. They were smooth?

A. Yes.

Q. Was there any water collected there?

A. Well, the dew, you see.

Q. The dew?

A. The dew.

Mr. Duke: That is all; take the witness.

Cross-examination.

Mr. Palmer:

Q. Mr. DeLucca, you are familiar with that bridge are you?

A. Yes, sir.

Q. I show you a photograph which purports to be a photograph of the bridge, showing that house up on top; do you recognize that as a photograph of the bridge, Mr. DeLucca?

A. Yes, sir.

The Court: May I have it?

Mr. Palmer: Yes, your Honor. (Examined by the Court.) We will ask this be introduced and marked Defendant's A on cross-examination.

The Court: Let it be marked Defendant's Exhibit 1.

Q. All right. We will offer that in evidence and ask it be marked——

The Court: Wait a minute; you had better have it marked; marked for identification.

Mr. Palmer: Just a minute; before you show it to the jury, have it marked and introduced.

[fol. 32] The Court: Why not have it in evidence?

Mr. Duke: All right, mark it in evidence.

The Court: As a picture of the house as it was on that evening.

Mr. Palmer: And we have no objection to it.

The Court: All right (Marked Plaintiff's Ex. No. 1).

Mr. Duke:

Q. That was the house where you accompanied your husband that evening?

A. Yes, sir (Handed to jury).

The Court: I think you may proceed with the examination.

Mr. Duke:

Q. Mrs. Bobo, did your husband have any conversation with you that evening as to what he was going to do the next morning?

A. Yes, sir, they were.

Mr. Palmer: One moment; the answer is "Yes, sir."

Mr. Duke:

Q. Now, Mrs. Bobo, what kind of a husband was Mr. Bobo to you?

A. Very good.

Q. Very good; he was kind and affectionate?

A. He certainly was.

Q. And to your children?

A. Yes, sir.

Q. Was he companionable with the boys?

A. Yes, sir.

Q. Did he help them with their lessons?

A. Yes, sir.

Q. Did he send them to school?
A. He did.
Q. And provided them with school. What salary did he earn?
A. Ninety dollars.

The Court:

Q. A month?
A. Yes, sir.

Mr. Duke:

Q. $90 a month?
A. Months.
Q. How high did he send the boy to school?
A. One is still going to High School; he has another term.
[fol. 33] Q. The younger boy has another term?
A. And the other one went three terms.
Q. And how much money did he contribute to the support of the family?
A. Well, we just had it together.
Q. Say how much, all of his salary?
A. All of it, yes, sir.
Q. All of his salary went to the support of his family?
A. Yes, sir.
Q. He maintained a home for you, did he?
A. Indeed he did.
Q. Always?
A. Yes, sir.
Q. And always was a kind and loving husband?
A. Yes, sir.
Q. And kind and loving father?
A. Yes, sir.
Q. How old was he?
A. 50 years.
Q. 50 years. What was the condition of his health; was he healthy?
A. Yes, sir.
Q. Was he ever sick?
A. No, not to speak of; nothing.
Q. Was he—did he work all the time?
A. He worked all the time.
Q. Never laid off any?

A. Never laid off.

Q. Did he have any days off up there; did he work continually?

A. Yes, sir.

Q. Worked 30 days a month, did he?

A. Yes, sir.

Q. Did he ever lay off for illness?

A. Well, not to speak of.

Q. Do you know whether he did or not?

A. Well, he never laid off, no, not very much. At times anyone is liable to be sick.

Mr. Duke: That is all; take the witness.

[fol. 34] Cross-examination.

Mr. Palmer:

Q. Mrs. Bobo, how long had he been working on that bridge prior to February 4th?

A. He went to work—six months it is.

Q. And had he during all that time worked on the same shift, that is, commencing at nine o'clock at night?

A. Yes, sir.

Q. And his hours commenced at nine o'clock at night and continues until when?

A. Until five in the morning.

Q. Until five in the morning; and when you came there to the bridge that night with him, about what time was it?

A. About ten minutes to nine, I think.

Q. About ten minutes to nine?

A. I think.

Q. Did——.

The Court (intg.): Speak a little louder; the jury must hear you.

A. About ten minutes to nine.

Mr. Palmer:

Q. Did he relieve another man on the bridge when he came there?

A. Yes, sir.

Q. Then there are three shifts, or were at that time?

A. Yes, sir.

Q. Three men operating as bridge tenders, eight hours a day each?

A. Yes, sir.

Mr. Palmer: That is all.

Mr. Duke: That is all.

Dr. J. H. KUSER, sworn as a witness for plaintiff, testified as follows:

Mr. Duke:

Q. Your name?

A. Dr. J. H. Kuser.

[fol. 35] Q. Dr. J. H. Kuser; you are a regularly licensed physician and surgeon?

A. I am.

Mr. Duke: You will admit the Doctor's qualifications?

Mr. Palmer: I will.

Mr. Duke:

Q. You are autopsy surgeon of the County of Marin, State of California?

A. I am.

Q. Did you have occasion to perform an autopsy on the body of a man that was drowned along in February?

A. I made a post mortem examination.

Q. A post mortem examination?

A. Yes.

Q. And did you learn at that time that that was Perry E. Bobo?

A. Well, I was told that was what it was; I did not know the man.

Q. What was the cause of his death?

A. Drowning.

Q. Drowning. What was the condition of the body?

A. Well, the body was in a fair state of advanced decomposition.

Q. Did you examine the body as to any marks of physical violence?

A. Well, there were evidences there which might be attributable to the elements, being in the water so long,

washing back and forth and coming up against the rocks or piles or whatever was there.

Q. The body was in such condition you could not state?

A. No, you could not; it would not give you any definite information.

Q. Where did you see the body, Doctor?

A. Up at the morgue.

The Court:

Q. How long after February 3rd, 1930, was it?

A. I saw the body on February 21st.

Q. Eighteen days after?

A. Yes. I made a statement that it was between two and three weeks.

[fol. 36] Mr. Duke:

Q. Did you say how long the body had been in the water?

A. I figured it—in my estimation I figured two or three weeks, considering the state of decomposition.

Mr. Duke: That is all.

Cross-examination.

Mr. Palmer:

Q. Doctor, you said you made a post mortem examination; is that the same as an autopsy, Doctor?

A. Yes, every autopsy is a post mortem examination, but a post mortem examination is not necessarily an autopsy.

Q. In other words, an autopsy is a more thorough examination, you examine very carefully to observe everything that might possibly cause the death?

A. In an autopsy, we open up the cavity to ascertain the cause of death beyond the shadow of a doubt.

Q. But in this case you did not do that?

A. You could not; it would not give you any information.

Q. Then you could not state positively whether or not he might have died of disease or something like that—a stroke, or heart trouble?

A. The condition of the body was such it would not allow you to draw any deduction.

Q. And then you do not want to say now positively that drowning was the cause of death?

A. That is the most probable.

Q. That is the most probable, that is as far as you could say at this time?

A. As far as I could say.

Mr. Palmer: That is all.

The Court:

Q. Was there something about the condition of his body that would lead you to believe drowning was a likely [fol. 37] cause?

A. Well, that—there was nothing on the body except it was immensely bloated and the skin was peeling off and as I say, the body——

Q. (Intg.) No, I mean was there anything about the body that would cause you to believe that drowning was the more probable cause of death than anything else?

A. In the absence of any decided manifestation, like what I said, a broken arm or leg or something like that, because the body was in perfectly normal condition as far as shape was concerned, outside of the bloat.

Q. Was the skin broken in any place?

A. Yes, the skin was macerated.

Q. In many place?

A. In many places.

Q. Was there any evidence of violence that you could see?

A. It could not be told. It could not be ascertained. The body was too far gone.

Q. You could not say, Doctor, whether he might have died of heart failure and fallen in the water?

A. The only thing you could do was to open up the body; it would not give you any information. Decomposition was too advanced with body fluids, gases and waste, and it would not give you any information; you could not substantiate it.

The Court: That is all.

Mr. Duke:

Q. In your opinion death was caused by drowning?

A. It was.

Q. And you signed a certificate to that effect?
A. And I signed a certificate to that effect.

Mr. Duke: That is all.

[fol. 38] Elwood Bobo, sworn as a witness for plaintiff, testified as follows:

Mr. Duke:

Q. What is your name?
A. Elwood Bobo.
Q. And where do you live?
A. Grand View.
Q. How old are you?
A. Twenty.
Q. When were you twenty.
A. September 22nd.
Q. Last September?
A. Last September.
Q. And this is your mother that was just on the stand?
A. Yes, sir.
Q. Perry E. Bobo was your father?
A. Yes, sir.
Q. What kind of a father was he to you?
A. A very good father.
Q. He educated you?
A. Yes, sir.
Q. Was he companionable to you?
A. Yes, sir.
Q. Did he assist you in your work at school?
A. Yes, sir.
Q. And always sent you to school?
A. Yes, sir.

Mr. Duke: That is all.
Mr. Palmer: No questions.
The Court: That is all.

FABIAN BOBO, sworn as a witness for the plaintiff, testified as follows:

Mr. Duke:

Q. Fabian, how old are you?
A. Eighteen.
Q. When were you eighteen?
A. November 10th.
Q. Last November?
A. Yes, sir.
Q. And where do you reside?
A. What?
Q. Where do you reside?
A. Grand View.
[fol. 39] Q. With whom?
A. With my mother.
Q. With your mother. Was Perry E. Bobo your father?
A. Yes, sir.
Q. When did you last see him?
A. February; February the 3rd.
Q. February the 3rd.

The Court: 1930, was it?

Mr. Duke:

Q. 1930?
A. 1930.
Q. A year ago last February?
A. Yes.
Q. And what kind of a father was he to you?
A. He was good.
Q. A good father?
A. Yes, sir.
Q. Kind and affectionate?
A. Yes, sir.
Q. Companionable?
A. Yes, sir.
Q. And did he assist you at your school work?
A. Yes, sir.
Q. And he sent you to school?
A. Yes, sir.
Q. And he provided for the family, your mother, your brother and yourself?

A. Yes, sir.
Q. And he always did that?
A. Yes, sir.
Q. And he worked continuously?
A. Yes, sir.

Mr. Duke: That is all.
Mr. Palmer: No questions.

FRED DELUCCA, sworn as a witness for the plaintiff, testified as follows:

Mr. Duke:

Q. What is your name?
A. Fred DeLucca.
Q. And what is your occupation, Mr. DeLucca?
A. Constable.
Q. And were you such constable in February, 1930?
A. I was.
[fol. 40] Q. Did you have occasion to go to the drawbridge at Grand View?
A. Yes, sir.
Q. Under what circumstances did you go there?
A. I was called about eight o'clock in the morning that Mr. Bobo was disappeared and I went there to investigate and——

Mr. Palmer (intg.): One moment; that is a response to that question. I do not want any volunteer statement.

Mr. Duke:

Q. You went to the bridge, did you?
A. Yes, sir.
Q. All right; when you went to the bridge, what did you do?
A. Well, I talked to Mrs. Bobo, and she said——
Mr. Palmer (intg.): One minute——
Mr. Duke (intg.): Never mind what she said. You found Mr. Bobo was missing?
A. Yes.

Q. Then what did you do?
A. I went to investigate about the stairway.

Mr. Palmer: One moment——

Mr. Duke (intg.): One moment; you went to the bridge, did you?
A. Yes, sir.
Q. Did you take any photographs of that bridge?
A. Yes, I took several.

Mr. Palmer: Are these the ones you want to offer?
Mr. Duke: Yes. Do you object?
Mr. Palmer: If he took them at that time.

Mr. Duke: I will show you these photographs and ask you if you took those photographs?
A. Yes, these are the photographs that I took.
[fol. 41] Q. Show them to the Court. (Examined by the Court.) When were those taken, Mr. DeLucca?
A. The next morning.
Q. You mean next morning, what morning was that?
A. The same morning that he disappeared.
Q. The 4th of February?
A. The 4th of February.
Q. Those portray the places that are exhibited on there?
A. Yes, sir.
Q. And this one, what is that?

A. This is the stairway and the platform.
Q. Stairway to where?
A. To go up to the engine room.
Q. Up to the engine room?
A. Yes.
Q. The engine room is located where—up above the floor of the bridge?
A. Up at the top, yes.

Mr. Duke: I offer that in evidence.
The Court: It might be better to offer them all at once.
Mr. Duke: What does that portray.
A. This is the top platform.
The Court: I would suggest you offer them all at once to be marked, and then as you question the witness you can identify them.

Mr. Duke: All right, we will offer these in evidence, and show them to the jury.

The Court: One exhibit and they will be marked "A," "B," "C" and "D."

Mr. Duke: Yes, "A," "B," "C" and "D."

(Marked "2A, 2B, 2C, 2D.)

Q. Now I show you Plaintiff's Exhibit 2C and ask you what that is?

A. This is one side of the bridge where the—that is the stairway.

[fol. 42] Q. That is the stairway leading from where to where?

A. Leading from the bottom to the top there.

Q. You mean from the floor of the bridge——

A. (Intg.) Yes, from the floor of the bridge.

Q. (Contg.:) To the engine room?

A. To the engine room.

Q. I show you Plaintiff's Exhibit 2-D, and ask you what that is?

A. That is the stairway; the same.

Q. The same thing?

A. The same thing, yes.

Q. That is the same thing, is it not?

A. Yes, sir.

Q. And I ask you what that is?

A. This is the platform at the top of the stairs from—to the engine room.

Q. What is that?

A. The top platform to the engineroom.

The Court: He said it was the platform at the top of the stairs to the engine room.

Mr. Duke:

Q. That is the foot of the stairs, isn't it?

A. Oh, yes.

Q. That is the bottom platform?

A. Yes, there is one on top like this.

Q. That is the foot of the stairs?

A. That is the foot of the stairs, yes.

Q. What is that, that is, 2-B?

A. This is the entrance to the bridge.

Q. Isn't that from the top of the stairs looking down—it looks to me like that?

A. I don't know; yes, that is the top.

Q. Top looking down?

A. Top looking down. I know I took two or three of them.

[fol. 43] Q. Plaintiff's Exhibit 2-B. (Handing Exhibit to Jurors) Now, Mr. DeLucca, I show you Plaintiff's Exhibit 2-A and ask you if you made an examination of the—of this platform at the foot of the stairs?

A. Yes, I did.

Mr. Palmer: Just a moment, let me see what one you refer to. (After examination) May I ask him a question? What are those things that are on the platform, couple of hammers or something?

A. Yes, I think there was a hammer or two that was there.

Mr. Duke: I will ask you if you made an examination of that platform?

A. Yes, I did.

Q. Did you find anything there?

Mr. Palmer: Well, one moment; "Did he find anything there?" I object to the form of that question; ask him what was the condition of the platform.

Mr. Duke:

Q. Well, what was the condition of the platform?

A. The condition was I examined it. When I examined that platform I was looking for marks.

Mr. Palmer: Never mind what you were looking for; just state what you did.

A. I saw there was a spot there and there was some sheepskin hair.

Q. What?

A. Sheepskin; some of the sheep hair.

Q. A spot there with some sheepskin hair on it?

A. Yes, right on the edge of the platform.

Mr. Duke:

Q. What was the nature of that spot, if you know?

A. It looked like blood to me.

Mr. Palmer:

Q. Looked like what?
A. Blood.

The Court:

Q. That platform, of what material was it constructed?
A. Steel.
[fol. 44] Q. Steel?

Mr. Duke:

Q. You say—where was the spot you refer to; just show the jury?
A. Right on this side.
Q. How far from——

Mr. Palmer (intg.): Just a moment.
The Court: Put a mark on it.
Mr. Palmer: Give me a chance to see it.
The Witness: This is the stairs; this is the stairs that lead down, and come out this way.
The Court: Put a pen mark on it, please.

A. Now the spot was right over here.
Q. We are wasting time unless you mark it.
A. I am marking it.
Q. With a pen?
A. No. Here is the spot right here at the edge and the wool was right at the edge of the platform, and the spot looked like blood to me and I believe it was blood, it was a little over to the side.

Mr. Palmer: I ask "It looks like blood to me and I believe it was blood" be stricken out as the conclusion of the witness.
The Court: Oh, I think it may stay in, Mr. Palmer.
Mr. Duke: Referring to Plaintiff's Exhibit 2-A, he has marked the spot where he saw saw the wool. Now where was the wool, Mr. DeLucca?

A. What is that?
Q. Where was the wool you refer to?
A. Right on the edge of the platform.

(Question read.)

Q. Now, Mr. DeLucca, did you see the body when it was recovered?

[fol. 45] A. I did.

Q. Was it—what was the condition of it as to clothes?

A. Clothes? He was dressed with blue overalls and one of these sheepskin coats.

Q. Sheepskin coat?

A. Yes, had sheepskin around the neck.

Q. Sheepskin collar?

A. It was brown coat with sheepskin collar around the neck.

Q. When you examined that bridge—when you examined that platform, that was the following morning?

A. The following morning, yes.

Q. In this picture you show hammers; were those hammers there?

Mr. Palmer: At what time? Of course they were there when the picture was taken.

Mr. Duke: I asked him the next morning, when you first examined the bridge?

A. No, no, they weren't there.

Q. They weren't there?

A. No.

The Court:

Q. What time the next morning was it you examined the bridge?

A. It was around eight o'clock.

Mr. Duke:

Q. Did you see marks on the body?

A. Yes, sir.

Q. Where?

A. Right in the back of the neck, there was a little bruise, bruised spot.

Q. How big was it?

A. Oh, round about couple inches diameter.

Q. Where did you see the body?

A. I saw him when they took him out of the water; I was right there to identify him.

Q. Who was there when you reached the body?

A. Oh, there was several there. There was a son and the undertaker, I think. Mr. Bobo, young Bobo was there.

[fol. 46] The Court:

Q. When you say "the undertaker," give the name, please.

A. I don't just exactly know his name. A tall fellow—William—I know him by sight but I do not know his name. I believe there were two there.

Mr. Duke:

Q. Did you examine the steps of the bridge?

A. I did.

Q. What was the condition?

Mr. Palmer: At what time?

Mr. Duke: Well, he refers to eight o'clock in the morning.

The Court: I think all his testimony refers to the first visit to the ground.

Mr. Palmer: He is now speaking about the body, some two weeks later. I just want to make it clear, that is all.

Mr. Duke:

Q. Did you, on the morning that you first went there, did you examine the steps and platform?

A. I did.

Q. What was their condition?

A. Very slippery.

Q. Very slippery; were there any dents? What was the condition of the surface of the platform and steps?

A. Why, they were slippery; wet, you know, bad condition, and——

The Court:

Q. Of what material were they made?

A. Steel; all steel stairs and a rail on the side.

Mr. Duke:

Q. Were the steps and the platform even or uneven?

A. Well——

Mr. Palmer (intg.): Objected to as leading, if your Honor please; he has asked him what was the condition of the steps and he has already answered it.

[fol. 47] Mr. Duke: All right.

The Court: Will you answer that question?

A. They were even? How do you mean?

Mr. Duke:

Q. What was their condition, were they even or rough?

The Court:

Q. You mean smooth or rough?

Mr. Duke:

Q. Smooth or rough?

A. They were smooth.

Q. They were smooth?

A. Yes.

Q. Was there any water collected there?

A. Well, the dew, you see.

Q. The dew?

A. The dew.

Mr. Duke: That is all; take the witness.

Cross-examination.

Mr. Palmer:

Q. Mr. DeLucca, you are familiar with that bridge are you?

A. Yes, sir.

Q. I show you a photograph which purports to be a photograph of the bridge, showing that house up on top; do you recognize that as a photograph of the bridge, Mr. DeLucca?

A. Yes, sir.

The Court: May I have it?

Mr. Palmer: Yes, your Honor. (Examined by the Court.) We will ask this be introduced and marked Defendant's A on cross-examination.

The Court: Let it be marked Defendant's Exhibit 1.

Mr. Palmer: One. I might introduce them all, if your Honor please, if I can. Do you recognize this photograph here, Mr. DeLucca, the one showing the bridge and the little house where the bridge tender is customarily seated?

A. Yes.

[fol. 48] Q. That is a photograph of that bridge?

The Court: All right, this will be 1-B; the first one will be 1-A.

Mr. Palmer:

Q. I show you here another photograph and ask you if that is also a photograph of the bridge, Mr. DeLucca?

A. This is a photograph of the bridge and the stairway.

Q. Yes.

The Court: It will be admitted and marked 1-C.

Mr. Palmer:

Q. I show you one other photograph, Mr. DeLucca, and ask you if that is a photograph of that stairway, looking down the stairs?

A. Yes.

The Court: It will be marked 1-D.

(Examined by counsel for plaintiff and handed to jurors.)

Mr. Palmer: This is the first one of the bridge, looking up towards the little house there on top of the bridge. Here is a picture of the house that Mrs. Bobo described, and the photograph looking down towards the bridge. Here is a photograph the witness identifies as that same stairway he speaks of. Here is a photograph looking down the stairs, the same stairway, from the top.

The Court: I would like to ask the witness at about what angle that stairway ran?

A. It is pretty straight.

Q. Well, how nearly perpendicular?

A. I could not say exactly, but it is almost perpendicular; it is pretty straight.

Mr. Palmer:

Q. Now, Mr. DeLucca, where are you constable?

A. What is that?

Q. Where are you stationed; where are you constable?

[fol. 49] A. In Novato.

Q. Oh, at Novato?

A. Yes.

Q. And they sent there for you, did they, that morning?

A. Yes.

Q. You were a friend of the Bobo family?

A. Oh, I know them.

Q. They used to live in Novato?

A. Yes, they used to live in Novato.

Q. And you say you went over there about eight o'clock that morning?

A. Something like that.

Q. When was the last time prior to that you had been over to the bridge?

A. Oh, I went there along about ten o'clock afterward, that night after I took this picture.

Q. No, when before this *way* was the last time you had been there?

A. Before that day?

Q. Yes, before that day.

Mr. Duke: That is objected to on the ground it is incompetent, irrelevant and immaterial, not cross-examination, when he went there before.

The Court: Overruled.

A. I never went there before Mr. Bobo got——

Mr. Palmer (intg.):

Q. You never had been there?

A. Oh, I was over to the bridge the time before I went over that bridge.

The Court:

Q. When was it?

A. Oh, I don't know; I did two or three years ago.

Mr. Palmer:

Q. Now what did your examination consist of that morn-

[fol. 50] ing, Mr. DeLucca, what did you do when you went there?

A. Well, we found out——

Q. (Intg.) No, what did you do; not what your purpose was, what did you do?

A. I looked at that stair. I went up to the engine room. I went downstairs and I looked at that platform, and it was a very dangerous place.

Mr. Palmer: Ask that be stricken out.

The Court: Yes. Never mind; just tell us what you did.

A. Well, that is what I did.

Mr. Palmer:

Q. Where else did you go? Did you go up to the other end of the bridge?

A. I went up to the other end; I looked at that lock. They got a lock where they lock the bridge. I looked at both locks, both sides. I looked down the water, and I looked for every place around there there was a possibility of finding him, to see if he was down in the water.

Q. You did not see any sign of him?

A. No sign of him, no.

Q. Now when did you discover this spot you speak of where the sheep hairs were?

A. Right that same morning.

Q. That same morning. Now what kind of a spot was it, what did it look like, how big was it?

A. It was not very big. It was dragged like, looked like when a man slipped and drags down, and there was a little spot of red that looks like blood.

Q. You do not know whether it was blood, do you?

A. Not very much of it; it looked like blood to me.

Q. You are sure it was blood; it might have been paint?

A. There is all black paint along right down around there.

Q. The bridge is painted black?

A. Yes.

[fol. 51] Q. You saw a spot that might be blood?

A. It looks blood to me.

Q. Was it dry or wet?

A. Well, it was not real dry.

Q. You could not tell how long it had been there?

A. Well, it looked more fresh to me than dry.

Q. You say there was dew on the platform?

A. Yes.

Q. Now about these hairs; how many hairs were there?

A. There was quite a number right on the edge of the platform, just like that, it was thick along there.

Q. How many of them?

A. Oh, considerable; quite a

Q. (Intg.) Did you take any of them with you?

A. Just I picked up a couple and looked them over and I decided it was sheepskin.

Q. Well, one man may decide have you got them now?

A. No.

Q. What did you do with them?

A. I just threw them down.

Q. You testified, did you not, at the Coroner's inquest after Mr. Bobo was recovered, his body was recovered, didn't you?

A. Yes, sir.

Q. You did not say anything there about the spot or about these hairs, did you?

A. Well, nobody ever asked me. They only asked me what I thought of. I thought of. I told them my opinion was he accidentally slipped on that stairs and went down in the water.

Q. You did not say anything about any spot or hairs at that time?

A. No, they didn't ask me.

Q. They asked you to give your report of your investigation, didn't they?

[fol. 52] Mr. Duke: Just a moment; let him read the evidence; the evidence is the best evidence.

Mr. Palmer: I will withdraw the question.

Q. Now, Mr. DeLucca, showing you your photographs that you testified you took, Plaintiff's 2-A, where you have marked the spot where this alleged spot was, now I will show you Defendant's Exhibit 1-C, and ask you if you can tell us by looking at the two where the spot was?

A. Right close to the edge, about.

Q. All right, will you get a pen and mark where it was on that, please. I think a pen is better. Mark where you think the spot was on that picture.

A. Right in here, right straight with the stairway here, only about ten inches from the edge.

Q. The spot was about ten inches from the edge?

A. Yes, and the hairs was right to the edge here of the platform.

Q. And this black dot on this picture is where you place——

A. (Intg.) The spot.

Q. (Contg.:) The spot?

A. Yes.

Q. You say the hair, however, was not right at the spot; that was about ten inches further up toward the edge, was it?

A. It was right at the edge.

Q. I see. I will show the jury where he marked this spot. It is wet yet, be kind of careful until it dries. You say, Mr. DeLucca, that those steps were smooth; they were made out of steel, weren't they?

A. Yes.

Q. And they had on all the steps there were these knobs, were there not, that show in the photograph here?

A. How do you mean, "knobs"?

[fol. 53] Q. Well, I show you——

The Court (intg.): Bolt heads?

Mr. Palmer:

Q. No, they are a non-skid arrangement. I don't know what they are. You can see them here. Those are the things that appear on those steps there. You have identified that as a photograph of the stairs?

A. Yes; yes.

Q. These are what I refer to?

A. Those knobs?

Q. Yes.

A. Yes.

Q. They were on the stairs?

A. Yes; yes.

Q. Certainly.

A. Yes.

The Court: That is from the top looking down?

Mr. Palmer: That is from the top looking down. And those same knobs were on the platform, too?

A. Yes—on the platform I don't recall; I think the platform is smooth.

Mr. Duke: If your Honor please, now we object to this on the ground—when were these pictures taken?

Mr. Palmer: I don't know, but he identified it.

The Court: No, let us ask the witness. The next morning when you went there and examined the stairway, did you see those knobs or bolt heads, or whatever they are, on the steps the same as are shown on that photograph?

A. I think there was a little groove here and there on the stairway.

Q. Were those knobs there the same as that?

A. Yes.

Q. Not any different from what you see there?

A. No.

Q. All right. Were there also knobs on the platform below?

A. No, the platform was smooth.

Q. The platform was smooth.

[fol. 54] Mr. Palmer:

Q. You don't mean to say that platform was perfectly smooth there that morning, Mr. DeLucca?

A. I am pretty sure.

Q. You are not positive? Look at that photograph.

A. As near as I can remember.

Q. Look at that platform and see.

A. It don't look like the same platform to me.

Q. You say it is not?

A. I won't swear to it, but according——

Q. (Intg.) In order there won't be any mistake, I will show you your own photograph taken that morning; take a look at the platform in there; don't you see knobs there?

A. Yes, there is.

Q. Well, they were there then, weren't they?

A. Must have been.

Q. Certainly.

A. I don't recall just now.

Mr. Palmer: I won't need to introduce this thing. I just want to show the jury the photograph of the platform with the knobs he has now identified being present at that time on the platform.

Q. Who recovered the body, Mr. DeLucca?

A. Well, some fellow—I could not think—I don't know the name now, but I believe he was hunting or fishing.

Q. And where was the body when you first saw it?

A. At the bridge there when they got in.

Q. The body had been taken out of the water?

A. It was right there at the edge of the water when they dragged him there.

Q. Who dragged him out?

A. I don't remember the name of the man now—the fellow with the boat, and they brought him in to the side, to [fol. 55] the edge of the water there. I was there, and also the coroner was there.

Q. And how did they pull him out, with a rope or something like that?

A. They had him tied under the arm here, and they just dragged him along the water.

Q. Now you heard Dr. Kuser testify this morning there were lots of bruises and cuts and so on at that time?

A. I did not examine the body at that time. I only saw the face and head and so forth, but the body I didn't, you know. He was dressed, you know, clothed, and he had that coat on and everything.

Q. You say that coat was on at that time, do you?

A. Yes, sir.

Q. Are you sure about that?

A. Positive.

Q. And you say it had a sheepskin collar?

A. Uh-huh; yes, sir.

Q. It was lined—the inside of the collar was sheepskin, is that it?

A. And outside, too.

Q. When you turned it up like that, the part that is open is not sheepskin?

A. Well, if you turn it up, yes, it was brown usually.

Q. After it is turned down, it is sheepskin on the outside?

A. Yes, sir.

Q. And how long after this morning that you went up to take these photographs was it that you saw this body being taken out of the water?

A. The same; the same. I think it was about four o'clock in the afternoon when they found him.

Q. Four o'clock in the afternoon?

The Court:

Q. Of what day?

Mr. Palmer:

Of what day?

[fol. 56] A. Oh, ten or eleven days later after he disappeared.

Q. But you weren't present at the time the body was first found?

A. Not when they found the body up in the creek, no.

Q. So you do not know of your own knowledge just where they found the body?

A. I know pretty near where they found it. They told me they found it up to the end of Reed slough.

Q. Some ways from the bridge?

A. Oh, I should say a mile and a half, two miles, something like that.

Q. You say that at the time you got there, there was dew on the stairs?

A. Yes, sir.

Q. It had not been raining that night?

A. No, it was cold.

Q. It was cold and clear?

A. It was cold and frosty.

The Court:

Q. Frosty?

A. Yes.

Mr. Palmer:

Q. Was there any frost, or was it dew?

A. By the time I got there the sun was up and of course there was dew. The frost would kind of naturally——

Q. (Intg.) You do not know whether the condition of those steps were dry or wet in the middle of the night?

A. Not in the middle—wet?

Q. That is my question.

A. They were, yes.

Q. All you can say is what you saw there when you got there at eight o'clock?

A. Yes, sir.

Q. And you say the steps were slippery because they were wet, is that right?

A. Yes, sir.

Mr. Palmer: That is all.

Redirect examination.

Mr. Duke:

Q. You were this photograph, and what represents what?
[fol. 57] A. The platform.

Q. All right. We will offer this in evidence. I think it is a better photograph than the one we have.

Mr. Palmer: It shows the same view as yours.

Mr. Duke: Yes, but it a larger photograph. We will offer that in evidence.

The Court: Admitted and marked next in order.

(Plf.'s No. 3.)

Mr. Duke: Mr. DeLucca, you say there were rises there, little bunches, sort of knobs, sort of corrugation, was it not?

A. Well, I suppose it is the way it is, I guess.

Q. How were they—what was their condition?

A. Well, how do you mean "their condition"?

Q. Well, were they worn or were they in good condition?

A. Oh, they were worn, of course.

Q. What was their condition, were they smooth or rough?

A. They were smooth; smooth; they are not rough.

Q. Yes.

Mr. Palmer:

Q. That photograph shows their condition?

A. Yes.

Q. They were just like they show in that photograph?

A. Yes.

Mr. Duke:

Q. You said there were grooves between them; what did you mean by that?

A. These little knobs.

Q. Little buttons, little rises?

A. Yes, but they were not very high, I remember now.

Q. That is what you mean by grooves in the iron?

A. Yes.

Q. Did you walk over it?

A. I walked up and down two or three times, yes.

[fol. 58] Q. You walked up and down; did you have any difficulty?

Mr. Palmer: Objected to as immaterial, irrelevant and incompetent, whether he had any difficulty.

The Court: Yes, sustained.

Mr. Duke: All right; that is all.

Mr. Palmer: I do not think that photograph has been introduced.

The Court: Yes, it has.

Mr. Duke: Yes, it has.

Mr. Palmer: All right, because I want to use it.

E. L. Lowe, sworn as a witness for plaintiff, testified as follows:

Mr. Duke: What is your name?

A. E. L. Lowe.

Q. E. L. Lowe; and what is your business or occupation, Mr. Lowe?

A. Well, I was last bridge tender for the N. W. P.

Q. You mean the Northwestern Pacific Railroad?

A. Yes.

Q. Where, Mr. Lowe?

A. Black Point.

Q. When did you last work there?

A. 23rd day of August, 1930, was the last day I worked there.

Q. Did you know Mr. Bobo in his lifetime?

A. Yes, sir.

Q. Did you see him on the 3rd day of February of 1930?

A. Yes, sir.

Q. Where?

A. At the bridge, bridge house; he relieved me at nine o'clock at night.

Q. He relieved you at nine o'clock at night; you worked from what hours, Mr. Lowe?

A. One P. M. to nine P. M.

Q. One P. M. to nine P. M.; and then he worked from what time?

[fol. 59] A. Nine P. M. to five A. M.

Q. To five A. M.?

A. Yes, sir.

Q. How was he dressed?

A. He was dressed in work clothes, overalls and heavy chinchilla coat lined with sheepskin or goatskin—I don't know which; one or the other.

Q. Did it have a collar on it?

A. Yes, sir.

Q. What was the collar?

A. It was a collar that turned down. I don't know how big the collar was. I presume 3 inches.

Q. What material was it?

A. Lined with the same material as the inside of the coat. I don't know whether the coat was lined clear through or not.

Q. The collar was?

A. The collar was, I know that.

Q. I see.

A. Sheepskin or goatskin, I would not say which.

Q. What was his condition that night, was he well?

A. Yes, sir.

Q. Have any conversation with him?

A. I did.

Q. What was that conversation?

Mr. Palmer: Objected to as incompetent, irrelevant and immaterial, hearsay.

Mr. Duke: Withdraw the question. Now I show you here a photograph, Plaintiff's Exhibit 1-B——

Mr. Palmer (intg.): Which one. Let me see it, Mr. Duke.

Mr. Duke: It shows the rest house, and — ask you what that portrays, Mr. Lowe?

A. That is the bridge and the little bridge house where the men usually sit in between times of boats, or operating the bridge—usually sit in there.

[fol. 60] Q. That is the little rest house you sit in when you are not working on the bridge?

A. Yes, sir.

Q. Will you describe to the jury how you operate that bridge, and from where?

A. We operate it from upstairs, up in the engine room. We first go up there, throw your semaphores——

The Court (intg.): Let me ask you, what attracts your attention to the necessity of operating the bridge?

A. Well, the arrival of boats, three whistles calling for the bridge.

Q. You are in that little house, rest house, and when you hear that signal you go to operate the bridge?

A. Yes, sir.

Mr. Duke:

Q. And where do you go to operate that bridge?

A. You go upstairs.

Q. You go upstairs. Now, I show you here a photograph, Plaintiff's Exhibit 1-C, and ask you if that portrays the stairs that you refer to?

A. Yes, sir.

Q. You go up; what do you do now with reference to those stairs?

A. Well, you come out here from your rest house, go up the stairs into your engine room.

Q. Then what is at the top of the stairs?

A. An engineroom.

Q. An engineroom at the top of the stairs?

A. Yes, sir.

Q. With an engine in it?

A. Yes, sir.

Q. Operated by what?

A. Gasoline.

Q. Gasoline; then what other apparatus are in that engineroom.

A. Well, your reverse.

Q. What would your reverse do?

A. They first reverse here for throwing your semaphores. [fol. 61] Q. Your semaphores here throw a clear signal for the train to pass?

A. At the end of the bridge, 500 feet away they were at that time; they are different now.

Q. All right. When you hear the whistle from a boat, what do you do?

A. Go upstairs, throw your semaphore, start your engine.

Q. How do you throw that semaphore, in the "Danger"?

A. Yes, sir.

Q. Throw your semaphore in the "Danger" so a train approaching would not attempt to cross the bridge, is that right?

A. No, sir, it would stop before he run inside the semaphore.

Q. Then what do you do?

A. You start your engine, open your bridge, and remain open until your boat gets through; close up again and go down and see that the ends of the rails are all right.

Q. You mean—you see the ends of the rails are all right, what do you mean by that?

A. See that they are closed.

Q. How do you know that?

A. You know by going and see. You must go to see; you don't take any guesswork about it.

Q. In other words, you have to go downstairs to do that operation?

A. You must do that; you must do that even if you are holding your train.

Q. Then what do you do?

A. You go up and throw your semaphores for your "Clear," and you are ready for your train to go through.

Q. Now, Mr. Lowe, what was the condition of that platform and those stairs on the night of February the 3rd?

[fol. 62] A. Well, perfect condition.

Q. Perfect condition. I mean what was the condition of the steps; were they worn or were they smooth, or were they——

A. (Intg.) Why, the steps, they are the same as they are all the time. They were dry but not smooth. There is rough places in the steps all the way up there; in the platform and in all the steps.

Q. But there is a—what do you mean by "rough places"?

A. Well, raised places; there are little knobs made in there when the steps are manufactured, you know. See? Little knobs I would judge, extending up probably an eighth of an inch, and they are quite thick all over the steps, for protection from slipping.

Q. Yes.

A. (Contg.:) Those knobs are there the same as they have been all the time.

Q. Now, Mr. Lowe, what was the condition that night as to being wet or dry?

Mr. Palmer: What time?

A. Well, I left there at nine o'clock in the evening; at that time it was dry; I don't know the condition afterwards.

Mr. Duke:

Q. You don't know what happened after 9 o'clock?
A. No, sir.
Q. You don't know the condition?
A. No, sir.
Q. As a matter of fact, during the entire winter there is dew collects on those steps every night?

Mr. Palmer: Objected to as incompetent, irrelevant and immaterial.
[fol. 63] The Court: Overruled.

Mr. Duke:

Q. Is that not right?
A. Shall I answer that question?

The Court: Yes.

A. Yes, dew collects more or less in the latter part of the night and early morning; generally the steps are wet.

Mr. Duke:

Q. Does that tend to make them slippery or otherwise?
A. Well, it makes them slippery more or less, yes, sir.
Q. Were there any dents in the platform other than those buttons or little raises?
A. Were there what?
Q. Were there any other dents in the platform or steps other than those little buttons that are on there?
A. No, not that I know of.
Q. Not that you know of. Mr. Lowe, were the buttons or that little raise that you have referred to as being about an eighth of an inch high, were they worn smooth or in good condition?
A. They were in good condition.

Mr. Duke: That is all.

Cross-examination.

Mr. Palmer:

Q. Mr. Lowe, you don't know of your own knowledge that there was dew on these steps the morning after Mr. Bobo disappeared, do you?

A. I do not.

Q. Generally on certain nights during the winter the steps have had dew on them in the morning?

A. They collect more or less dew after midnight most every night in the winter time. Probably a clear night, clear windy night you would not find any dew there in the [fol. 64] morning, but generally during the winter there is more or less dew collected on these steps.

Q. And these knobs are on the step here to prevent slipping?

A. That is the object of the knobs being there.

Q. And they generally prevent it being slippery, do they not?

A. To a great extent, I judge.

Q. How long had you been on the bridge up to the time——

A. (Intg.) A little over six years on that bridge.

Q. And you served with various shifts, that is, night shifts?

A. Well, I served night shift three years and then I served this shift from one P. M., the remainder of my time there?

Mr. Palmer: Yes. That is all.

Redirect examination.

Mr. Duke:

Q. Mr. Lowe, do you consider that a dangerous stairway?

Mr. Palmer: Objected to as incompetent, irrelevant and immaterial, calling for the opinion and concluison of the witness on a matter to be passed on by the court or jury, what he considers to be safe.

The Court: The question is, Would it enlighten the jury in any way? He is familiar with it.

Mr. Palmer: He can state what the conditions are, but his opinion is wholly immaterial.

Mr. Duke: Submit the objection.

The Court: Well, he has information that the jury have not; he is familiar with it.

Mr. Palmer: Any facts, of course, your Honor, that are admissible.

[fol. 65] The Court: I think he may give his opinion and then give the reasons for it. I will allow the question.

Mr. Palmer: Did you hear the question?

A. State the question again, please.

The Court:

Q. In your opinion was that a dangerous stairway?

A. Well, I cannot say that it is any more dangerous than any other stairway. We will take into consideration that any stair a man goes up and down, that if he stubs his toe or something, he would slip and fall; he would fall the same as any other steps. The stairs were in perfect condition; the railing and the steps and everything were perfectly solid, perfect condition.

By Mr. Duke:

Q. Let me ask you, did you walk down that stairway the same way you walk down any other stairway?

A. Well, I was always very careful in going down that stairway. It is a long stairway; I believe 32 or 35 steps there.

Q. What is the angle?

A. I judge about 65 degrees. I imagine that is about what it is; I could not say for sure.

Q. It is a very steep stair, is it not?

A. It is a very steep stair. I was always very cautious in going down that stairs; in other words, I was never in too big a hurry to be very careful; took hold of the railing with one hand, or both railings if I hadn't one of my hands carrying something. I was never without taking hold of the railing and being very careful and watching my step.

Q. Why did you do that?

Mr. Palmer: Objected to as immaterial, if your Honor please.

The Court: He says in order to be careful.

[fol. 66] Mr. Duke: All right.

Q. Mr. Lowe, did you have any lanterns or lights?

A. I always carried a lantern. The whole time I was there I carried a lantern more than I ever did a flashlight: I was very unfortunate with flashlights, and I just discarded them and I most always used a lantern at night.

Q. What kind of a lantern?

A. Just ordinary railroad lantern.

Q. What did Bobo carry, do you know?

A. I think he used to use a flashlight; lantern and flashlight. I think he used lantern and flashlight both as a rule.

Q. Lighted lantern?

A. One lighted lantern.

Q. Did the company supply you with lights?

Mr. Palmer: Objected to as immaterial, if your Honor please.

Mr. Duke: It is very material.

The Court: Overruled.

A. Answer that question, shall I?

Q. Yes.

A. Yes, our lanterns were furnished, I think, by the railroad company. They were always there and in good condition. Mr. Campbell, my foreman, looked after those lanterns himself, and he always had good lanterns there and in good condition, well cleaned and well filled; in perfect condition. Sometimes I looked after those myself but as a rule Mr. Campbell had those things always attended to and set out in their place.

Mr. Duke: That is all.

Mr. Palmer: How old a man are you, Mr. Lowe?

A. I am 65 years old, almost.

Q. And—I think that is all.

A. Sir?

Mr. Palmer: That is all.

[fol. 67] JOHN LEE BOBO, sworn as a witness for plaintiff, testified as follows:

Mr. Duke:

Q. What is your name?

A. John Lee Bobo is my name.

Q. What relation did you bear to the deceased?

A. Brother.

Q. Brother. And I direct your attention to the morning of February the 4th, 1930, and ask you if you were at Grand View?

A. Yes.

Q. Well, were you at your sister-in-law's home?

A. On the morning of the 5th; I was not there the first morning.

Q. But you were there the next morning, and you were there the day following the day your brother was missing?

A. Yes, I was there the following morning.

Q. And did you make any examination—I show you here Plaintiff's Exhibit 1-C and ask you if you recognize that photograph?

A. Yes.

Q. What is that?

A. That is a photograph of the bridge taken from the upper end.

Q. Do you recognize this—that flight of stairs?

A. Yes, it looks natural to me.

Q. And do you recognize this platform?

A. Yes.

Q. Did you make any examination of that platform when you arrived there?

A. I did.

Q. Did you see any—what did you examine it for?

A. Well, we was looking for brother, anything we could find, anything to see where, why or what would be the cause, where he could have went to. He just disappeared; no one [fol. 68] knew why. We were looking for any clew, or anything.

Q. What did you see, if anything?

A. We found, at the bottom of the steps where this comes off with a bump——

The Court (intg.):

Q. You mean at the platform?

A. At the bottom of the stairs, at the platform, just underneath the railing, it comes over like this, there was a bunch of very fine hair; I could not say what kind in particular, and I never took any off; and back of it was this red spot that looked like blood to me.

Mr. Duke: That is all.

Cross-examination.

Mr. Palmer:

Q. This was the following day, was it?

A. Yes; well, it was the second.

Q. This was a steel step, was it?
A. It is iron or steel of some kind; hard.

Mr. Palmer: That is all.

THOMAS B. ADGE, sworn as a witness for plaintiff, testified as follows:

Mr. Duke:

Q. Mr. Adge, what is your business?
A. I am contracting.
Q. And where do you reside, Mr. Adge?
A. San Rafael.
Q. Did you know Perry E. Bobo in his lifetime?
A. I did, yes.
Q. How long had you known him?
A. Well, we were boys together.
Q. Boys together. Did you—were you in the vicinity of Grand View on the morning of February the 4th, 1930?
[fol. 69] A. No, I did not go up there on the 4th; I did not hear about his death, I think, until about two days after, about the 6th.
Q. The 6th; and did you visit Grand View on the 6th?
A. I did; yes.
Q. For what purpose?
A. Well, I heard that he had disappeared; I went up there to see if I could help Mrs. Bobo or his family to find him.
Q. You directed your efforts in that direction?
A. I did, yes.
Q. And what did you do?
A. Well, I went up there first, looked around the bridge there. I brought a kicker up I had for the boat to see if I could help them out. When I seen there were some other fellows there with a boat which was towing a crab hook; they had a bunch of hooks on a rope there, dragging for him. I was going up there to help them all I could.
Q. I show you here Plaintiff's Exhibit 3 and ask you if you recognize that photograph?
—. Yes, this is the bridge here and this is the platform.
Q. The platform; did you make any examination of that platform?
A. Yes, I did.

Q. And what did you find, if anything?

A. Well, right—right at the edge of the platform, right straight down at the foot of the stairs, there was a lot of hair, looked like, along in there. On examining it closely, it looked very like sheepskin's wool; and about—probably 8 or 10 inches from the edge there, there was a spot which was dried up but it looked like blood.

Q. Did you examine it?

[fol. 70] A. Yes, I got down and took my knife and put it under and it flaked a little bit and they told me to leave it alone because somebody else might want to see it. I did not examine it any closer. I thought it looked like blood.

Mr. Duke: That is all.

Cross-examination.

Mr. Palmer:

Q. You say you examined these hairs?

A. The stairs?

Q. The hairs on the edge?

A. Yes.

Q. What did you do, pick them up?

A. Well, I just took up two of them; they told me to leave them there; there was a bunch. I just picked up a couple of them.

Q. Who told you to leave them there?

A. I don't know. It was the bridge tender or some other fellow that was there. There were a couple of other men there examining at the same time.

Q. You did not take them away or make any examination of them, anything of that kind?

A. No.

Q. You did not know how long they had been there?

A. Yes.

Mr. Palmer: Withdraw that question. That is all.

Mr. Duke: That is all.

The Court: That is all.

Mr. Duke: Mr. Campbell.

MICHAEL CAMPBELL, sworn as a witness for Plaintiff, testified as follows:

Mr. Duke:

Q. And what is your business or occupation, Mr. Campbell?

A. Bridge tender.

[fol. 71] Q. Where?

A. Black Point.

Q. Black Point. That is at Grand View, is it?

A. At Grand View, Black Point bridge.

Q. You are employed by the Northwestern Pacific Railroad Co.?

A. Yes, sir.

Q. And you are employed there now, are you?

A. Yes, sir.

Q. And you were during February of 1930?

A. Yes, sir.

Q. And what is your position on that bridge; are you——

A. (Intg.) Bridge tender.

Q. Are you the foreman?

A. I am the foreman, yes.

Q. How many men operate under you?

A. Two; there are two besides me.

Q. Two besides you, but you are the foreman?

A. I am the head bridge tender, yes.

Q. You knew Mr. Bobo in his lifetime?

A. Only since he came there to work there, I knew him.

Q. You knew him on February 4th, 1930?

A. Yes, sir.

Q. And he was working on the bridge?

A. He was working on the bridge, yes, sir.

Q. What were his hours?

A. He went on at nine and went off at five. I relieved him at five in the morning.

Q. You relieved him at five in the morning?

A. Yes, sir.

Q. During all the time he was employed there did he work in the night time?

A. He worked in the night time all the time.

Q. On the same shift?

A. Yes, sir.

Q. From nine to five?

A. From nine to five.

[fol. 72] Q. And you have heard the description at the house and the bridge, Mr.—by Mr. Lane?

A. Yes, sir.

Q. That is correct, is it not?

A. That is about correct, yes.

Q. Did you see any lights there the morning when you arrived on the morning of the 4th?

A. Any what?

Q. Any lights that—I withdraw the question. You carried lights with you at night?

A. Yes, we carried a flashlight or lantern.

Q. Flashlight or lantern?

A. Yes, flashlight or lantern.

Q. Did you see either of those lights there the following morning?

A. The lantern that Mr. Bobo used or had to use, that was on a table in the little rest shack; that is about 200 feet from the bridge; that had not been taken out——

Q. (Intg.) That was——

Mr. Palmer (intg.): Let him finish.

A. That had not been taken out of that little house; it was standing on a table; that table in this little rest house. This lantern was still lighted.

Mr. Duke:

Q. Was it lighted?

A. Yes, sir.

Q. The lantern was lighted?

A. The lantern was lighted.

Q. And did you see his flashlight there?

A. No, I did not see any flashlight.

Q. Are there any lights on the step of that bridge?

A. Any lights?

Q. Yes.

A. No, sir.

Q. No lights on the bridge at all?

A. There was lights on the top of the bridge but they have no effect underneath. They don't show any light on [fol. 73] the bridges; they are just for the boats.

Q. Those are signal lights?

A. Those are signal lights at night for boats.

Q. They are not to show the workmen the way on the bridge?

A. Exactly.

Q. They are the signal lights for the boats?

A. They are the signal lights.

Q. Now, Bobo was not there, of course, when you arrived?

A. No, sir.

Q. You only know you saw evidence he had been there by the lighted light?

A. The light, and the paper was on the table, one half of it. Chair was sitting alongside; one-half of the paper was sitting alongside of the chair and his glasses were on this half of the paper.

Q. Do you keep any record of boats that pass through there?

A. Yes, sir.

Q. Was there any?

A. The last record was 1:20, I believe, the Petaluma going south, steamer Petaluma.

Q. In whose handwriting was that?

A. Mr. Bobo's.

Q. Mr. Bobo's showing that the steamer Petaluma passed through at 1:20?

A. 1:20, I believe; 1:15 or 20; 20, I think.

The Court:

Q. Where is that record kept, in the house on top of the bridge?

A. In the house on top of the bridge.

Mr. Duke:

Q. That is sort of a log you keep up there?

A. Log, yes, sir, supposed to keep.

Q. Do you keep any records of any trains passing through there?

A. No, sir.

[fol. 74] Q. Was there any train passing there that night?

A. Passed there? Yes, sir.

Q. What time?

A. That train went through somewheres around somewheres after two; I would think around 2:30 or 40. I did know the time but I disremember now; it was after two.

Q. What was it, passenger or freight train?

A. Freight train.

Q. And, of course, that train could not pass over that bridge unless the semaphore was set "Clear"?

A. The semaphore had to be set "Clear" for the train.

Q. The bridge was in a condition so the train could pass over it in perfect safety?

A. Yes, sir.

Q. Now I will call your attention to this photograph, which is Plaintiff's Exhibit 3, and ask you if you recognize that?

A. Well, it is the bridge, yes, sir.

Q. It is the bridge?

A. Yes.

Q. Did you notice some people examining that platform?

A. Yes, I did, the next day, yes.

Q. And did you observe anything there, was anything called to your attention?

A. I saw somebody down there with a match considering a black stain around that was on a ring, it apparently was. One or two talking about it. Some were saying it looked like blo[illegible]; some were in doubts. I didn't they weren't blowing weren't asking for the bridge so I did not give it much attention.

Q. Did you see any wool or hair on the tip of that

A. (Intg.) Not where the spot was, no.

Q. On the edge there?

A. Yes, on this edge under that rail, one or two hairs. [fol. 75] I saw one fellow calling attention to some hairs; not many, just a few on the edge of the iron.

Q. Yes. What was the condition of those stairs towar' the bottom, was it smooth?

A. Well, no, the stairs got a hunch mark or corrugation that looked like you drive a punch through the iron; they set up, I should say, about a quarter of an inch. They are about three inches—there are three rows of them on each step.

Q. Are the steps even or uneven?

A. They are—you mean the surface?

Q. Yes.

A. They are corrugated with those punch marks.

Q. Well, are they worn smooth from stepping on them?

A. Well, I expect they are; they are smooth on top, but nevertheless they stick up higher than the step.

Q. The same applies to the platform, does it not?

A. The same applies to the platform.

Q. Are there any dents in that platform? Or whatever it is made by those little inverted buttons?

A. I don't think so. I never noticed any.

Q. Now, Mr. Campbell, with reference to that night, was there any dampness collected on those steps, if you remember?

A. Well, no, I would not. I don't remember; I don't remember; I didn't pay any particular attention to that part of it, although I would say possibly they were damp.

Q. In fact, almost every night

A. (Intg.) Almost every night.

Q. (Contg:) There is more or less dew collects on that platform and those steps, every night?

A. What?

[fol. 76] Q. There is more or less dew collects on that platform and those steps every night?

A. Pretty near every night of the year around there is a little dampness through the night time.

Q. Now, Mr. Campbell, with reference to those stairs, what would you consider, are they rather a dangerous flight of stairs?

Mr. Palmer: For the purpose of the record, I make the same objection, immaterial, irrelevant and incompetent, calling for the opinion and conclusion of the witness.

The Court: All right. Give your opinion and then the reason for it.

A. Oh, I consider them dangerous.

Mr. Duke:

Q. Yes. Why?

A. Well, they are an iron step. They might be considered not as good as wooden, and they got two portions to the rails less than two feet apart that sets up about as high as—that high, up maybe two feet, maybe a little less, and they are so close together they take the biggest part

of the jar; you will always start to hit that with your hand if you should fall.

Q. How about the rail on the inside?

The Court: Of what?

Mr. Duke: On the outside of the platform?

A. Down below?

Q. Yes.

A. That rail was about half ways out; the balance, there isn't any, on account of the trains coming so close they could not run the rail out to the track.

Q. In other words, this Plaintiff's Exhibit 3 portrays the rail, does it not, on the platform?

A. Yes, that is correct.

Q. And that rail is how high from the stairs and from the platform?

[fol. 77] A. You mean how high up?

Q. Yes.

A. I would say about two feet. I never measured it; around two feet.

Mr. Duke: That is all.

Cross-examination.

Mr. Palmer:

Q. Just a minute, Mr. Campbell. The rail alongside the steps, you say you never measured it—is it about the ordinary height of a hand rail on steps?

A. About the usual height, yes.

Q. And a railing on both sides?

A. One on both sides.

Q. And these corrugations, these knobs on the steps, prevent slipping, do they not?

A. Oh, yes, yes, they are bound to take up a slip; they stick up so high, they naturally stop your slipping.

Q. Even in spite of dew—even if there was dew there, these little knobs prevent one from slipping on the step?

A. Yes.

Mr. Cowen: Just one moment; it is leading.

Mr. Palmer: I have a right to ask leading questions on cross-examination; he is not our witness.

Q. And you have been on the bridge how long, Mr. Campbell?

A. Been about eighteen; since 1915 on this present bridge.

Q. Been up and down these stairs all this time?

A. Pretty well.

Q. Never had any difficulty, did you?

A. I never did, no, sir.

Q. And the stairs were in perfect condition on the night that Mr. Hobo disappeared?

A. They were in good condition, yes, the stairs were.

[fol. 78] Q. Now I think that is all at this time.

Mr. Duke: Well

Mr. Palmer (cont'g.): I will just show you one other picture, Mr. Campbell; this is another picture. This shows, does it not, for the purpose of the record just a second; this is Plaintiff's Exhibit 1 C. This shows the

A. (Cont'g.) The stairs going up to the engine room.

Q. And it shows that platform, does it?

A. Yes, sir.

Q. And it shows the hand rail?

A. Yes, sir.

Q. The hand rail comes in at about the end of the bridge, is that correct?

A. Well, yes, pretty near to the edge of the structure, yes, then there is an opening there.

Q. To the edge of the structure?

A. Yes.

Q. In other words, when you come to the end of that rail, if anybody should fall off, they would fall on the structure, on the bridge and not down on the water?

A. They could fall into the water; they could go in here; there is an opening there.

Q. They would have to go through that place?

The Court: Let him finish his answer. There is an opening there?

A. There is an opening there, I would say close to two feet.

Mr. Duke: As a matter of fact it is two foot eight, is it not?

A. Is it?

Mr. Palmer:

Q. From the rail out to the tracks?

Mr. Duke: No, from the bottom of the platform to the top rail.

Mr. Palmer: That isn't what I am talking about, Mr. Duke.

Mr. Duke: Oh, excuse me.

[fol. 79] Mr. Palmer:

Q. This photograph is another photograph of the same platform you just were shown a minute ago.

A. Yes.

Q. Another view of it.

The Court:

Q. How many steps are there in that stairway?

A. There are 35, I believe, counting the landing. 34.

Q. 34; what angle are they set in?

A. Oh, there is quite an angle. I would say the top of the bridge is about as far away from the base that way as the length of the whole thing; it is about 50 per cent angle, I suppose.

Mr. Palmer:

Q. About 50 per cent angle?

A. I don't know what the percentage is, but it is quite an angle.

Q. In other words, they are not perpendicular?

A. Oh, no; no.

Q. You state when you came there that morning the lantern Mr. Bobo had customarily carried was in the little house here at the other end of the bridge?

A. On the table, yes.

Q. And it was lighted?

A. Yes, sir.

Q. Now is it the practice and custom of the bridge tender to carry a lantern or some kind of light when they go out to operate the bridge?

A. They ought to, yes, because it is dark; everybody carries some kind of a light.

Q. You always do it?

A. I always do it, yes.

Q. That is what the lantern is furnished for?
A. That is what the lantern is furnished for, yes.

Mr. Palmer: That is all.

Redirect examination.

Mr. Duke:

Q. Now, Mr. Campbell, anybody falling through, off of the stairs coming down to the left, or falling, if there was [fol. 80] nothing to prevent them, they would fall into the water, wouldn't they?

A. If they didn't get hold of something, yes, of course.

Q. If they fell and didn't get hold of anything, if they fell off of that platform or stairs, they would fall into the water?

A. They would be very liable to do that, yes.

Q. Nothing to prevent it, is there?

A. If they fell, they would be below the rail.

Q. But there is no guard between that one rail and the steps and that one rail and the platform?

Mr. Palmer: What do you mean by that? Object to that question—well, it is incomprehensible to me; I don't understand it.

Mr. Duke: Well, we will make it comprehensible. In other words, there is no protection between that rail and the steps, is there?

Mr. Palmer: The photograph speaks for itself.

A. No, there is no protection between the top of this rail and steps. Below there is an opening under the rail, yes.

Q. There is an opening under this rail?

A. Yes.

Q. If a person should fall, say, from that platform, fall through, there is nothing to prevent him from falling into the water?

A. No.

Q. He would naturally fall in the water?

A. If he lost his balance, he would naturally fall in the water, yes.

A. I am referring to Plaintiff's Exhibit 1-C.

The Court: Any other questions?

Mr. Duke: That is all.

Mr. Palmer: That is all.

[fol. 81] COLLOQUY

Mr. Duke: If your Honor please, before we adjourn—what about going out to see that place?

Mr. Palmer: I don't know; we have no objection; it is up to the Court. It is quite a trip. I haven't a particle of objection; it is rather difficult to accomplish.

Mr. Duke: The jury ought to see that platform and see that rail, and that set-up out there.

The Court: Well, it is all right as far as I am concerned, having the jury view the premises. Can you make arrangements to have a bus here, or some conveyance for them?

Mr. Duke: I think so. What time? Two o'clock?

The Court: Leave here at 1:30. (Jury dismissed with the statutory admonition, and reported back in the courtroom at 2:50 P. M., at which time the further hearing of the matter was resumed.)

The Court: Will counsel stipulate that all jurors are present?

Mr. Palmer: Yes, your Honor.

Mr. Duke: Yes, your Honor.

The Court: Proceed.

Mr. Duke: Just one moment.

The Court: You may proceed when ready.

Mr. Duke: Yes, if your Honor please, and Ladies and Gentlemen of the Jury, under the American Experience Mortality Table, counsel has stipulated that the expectancy of the deceased, whose age was 50 years—his expectancy is 20.91 years. That was the deceased. For Mrs. Bobo, whose age was 45, her expectancy was 24.54 years; now the young-[fol. 82] est boy, who is 17 years of age, his expectancy was 44.19 years; and for the older boy, whose age is 19 his——

The Court (intg.): He is 20.

Mr. Dowen: He was 19 at that time.

Mr. Duke: He is 20 now, nineteen at the time of the death of his father, his expectancy would be 42.87 years. Counsel will stipulate that is according to the mortality tables.

Mr. Palmer: So stipulated, your Honor.

Mr. Duke. Mr. Munz. If your Honor please, we have sent for Mr. Munz; I expect he will be here.

The Court: He is here now.

Mr. Duke: Oh! Mr. Munz.

CHARLES MUNZ, sworn by the Court as a witness on behalf of plaintiff, testified as follows:

Mr. Cowen:

Q. How do you spell your name?
A. M-u-n-z.
Q. What is your business, Mr. Munz?
A. Merchant.
Q. And you reside in San Rafael?
A. Yes, sir.
Q. Did you know Mr. Bobo?
A. No, sir.
Q. Did you have occasion to go to the bridge?
A. Yes, I was there.
Q. At Grand View?
A. Yes, sir.
Q. At Black Point?
A. Yes, sir.
Q. When?
A. That morning it happened.
Q. The morning it was reported that a man had disappeared from the bridge?
A. Yes.

[fol. 83] Q. That was the day; that was the morning. Did you make any—just a moment. I show you this photograph, Plaintiff's Exhibit 3, and ask you if you recognize that photograph?
A. It is the bridge all right.
Q. Well, can you recognize this platform?
A. Yes, I recognize that; that is the steps.
Q. That come down?
A. That come down.
Q. Did you make an examination of that platform that morning?
A. Yes.
Q. For what purpose, Mr. Munz?
A. Well, I didn't particularly have any purpose more than I was there with some other fellows and we were looking around and we seen the sheepskin on the—hair or what you call it, on the step.
Q. Where?
A. Right on the edge of the step.
Q. Of what step?

A. Of the platform.

Q. Will you just point to the place on there where you saw it?

A. Yes, right in

Mr. Palmer (Intg.): Just a minute, let me see.

Mr. Duke:

Q. Right where? Point again.

A. This is where the step comes down, right in the side there where it came right straight through.

Q. Right in front of the steps?

A. Right in front of the steps.

Q. At the edge?

A. At the edge, yes.

Q. And did you see any other mark there?

A. No; I didn't.

Q. Will you mark that?

Mr. Palmer: On which photograph, Mr. Duke? We already have a lot of marks and I don't want to confuse that.

Mr. Duke: I thought I was showing him another photograph.

The Court: Does he indicate the same place on this photograph?

Mr. Duke:

Q. I am showing you photograph 1-C and ask you if you recognize that photograph?

A. Yes. Right here; about right in there is where I saw it.

Mr. Palmer: Now put a mark. Ask him whether or not that mark that is there is about where

A. (Intg.) Well, it was all along this edge, right in there, along in the middle; along that edge.

Mr. Palmer: And he has indicated the area on either side of the black ink mark which now appears on this photograph, Plaintiff's Exhibit 1-C. Is that correct?

Mr. Duke:

Q. On the edge of the platform?

A. On the edge of the platform. It was not only one particular place; it was across the platform. You could see it in three or four places.

Mr. Palmer:

Q. How wide?
A. Oh, a place maybe that wide.

Mr. Duke: One moment——
Mr. Palmer (intg.): He indicates about two feet wide. All right.

Mr. Duke:

Q. Did you see anything else?
A. There? I didn't.
Q. Was your attention called——
A. (Intg.) I did not see any spot. My attention was not called to any spot. I did not see any spot of any kind.
Q. All you saw was the fuzz on the edge there?
A. Yes, I saw the fuzz, quite a bit of it. We picked it up, [fol. 85] three or four of us there and we examined it. It appeared to be more of a sheepskin wool than of human hair.
Q. Who was with you?
A. Well, there was a fellow by the name of McGrath and Handerkin.

Mr. Duke: I think that is all.
Mr. Palmer: No questions.
The Court: That is all.

Mr. Duke: If your Honor please, that is the case of plaintiff with the exception of an expert. I did not anticipate we would finish this quick, so we have arranged for an engineer to come over here in the morning.

The Court: I want to give the jurors an opportunity now to ask any questions they may wish to ask. Some of them expressed a desire to ask questions while up at the scene of the alleged accident, and we must have all those questions and answers in the reporter's record. Of course it would not do to take testimony up there. Now if there is any juror who has a question in mind, he might ask the question and we will try to have it answered.

A Juror: Why isn't the railing of this platform extended nearer the rail?

The Court: You mean the rail of the railroad track?

A. Juror: Yes.

Mr. Palmer: You mean the hand rail is not extended in more toward the railroad bridge?

A Juror: Yes.

[fol. 86] Mr. Palmer: I think Mr. Campbell answered that on the stand pardon me, Mr. Duke this morning, but I think that is in the record. I have no objection if Mr. Duke will put Mr. Campbell back on the stand again. It is not part of my case.

Mr. Duke: Mr. Campbell, take the stand.

MICHAEL CAMPBELL, recalled by plaintiff, testified as follows:

The Court: I think it was answered this morning.

Juror #9: Why didn't he extend it over?

Mr. Palmer: Yes, why?- Why isn't it extended in this way, he means?

The Court: I think the jurors wish to ask Mr. Campbell why isn't the hand rail which runs from the platform at the foot of the ladder toward the railroad track extended further in toward the railroad track.

A. Well, it can't extend in any further without interfering with a car going by; the train would strike the end of the rail if it went all the way over.

Mr. Palmer: May I ask this question as part of my cross examination, in connection with that? Mr. Campbell, does that rail extend in to the alongside of the upright timbers, upright girderes there on the bridge?

Mr. Cowen: What is the question?

(Question read.)

Mr. Palmer: Answer the question.

A. I believe it is pretty close. I do not think it is all the way up to it, though I would not be positive. I think though

The Court (intg.): Let me see it, please.

Mr. Palmer: This photograph shows the situation.

[fol. 87] Mr. Duke: Mr. Campbell are you through?

Mr. Palmer: Yes.

Mr. Duke:

Q. Mr. Campbell, what is the overlap of a car on a rail, this rail?

Mr. Palmer: I wonder if he is qualified to testify as to that?

Mr. Duke: I don't know. If he can't, he can say so.

A. Well, as I understand you mean how far the car comes out from the rail?

Q. Yes, how far does the car overlap that rail?

Mr. Palmer: Which rail?

A. You mean the rail

Mr. Duke (Intg.): Either rail.

A. A passenger car I would say, without being positive, would be about 18 inches.

Q. 18 inches; what about a freight car?

A. A freight car would not go so far, the step would not.

Q. Do you know the distance between the end of that rail and the track?

A. Between the end of that rail and the track?

Q. Yes. You said that would interfere with the passing of cars; now how far - how what is the distance between the end of that rail

A. (Intg.) And the track?

Q. And the track.

A. I would say it was about two feet and a half.

Q. Two feet and a half?

A. That is guessing at it. I never measured it but I would say about that.

Q. About two feet and a half?

A. About two feet and a half; that is pretty close.

Q. Two feet and a half.

[fol. 88] The Court:

Q. How far is the last support, upright support of that hand rail from the end of the railroad ties?

A. Oh, it must be over two feet because the rail has it for support, the stanchion; over two feet I would say.

Mr. Duke:

Q. I am asking you, Mr. Campbell, this question. I am referring now to Plaintiff's Exhibit 106; how far is it from

that point on that rail to this track, to the inside track next to the——

A. (Intg.) To the bridge?

Q. Next to the rail.

A. You mean from this point here?

Q. You were asked the question why that rail was not extended further out by the juror.

A. Yes.

Q. And you said it was because the car would interfere with the rail; that is your answer?

A. That is the answer, yes, that is correct.

Q. How far is it from that point to the rail?

A. I would say around, between 18 inches and 2 feet and maybe a little more.

Q. You say it is only two feet from there to there?

A. That is only a guess; I guess maybe two and a half, I said before, from the point of this pipe to the track.

Q. How far is it from the semaphore pipe line to the track?

A. Oh, that is less than a foot.

Q. Less than a foot?

A. That is just inside the wooden rail.

Q. Less than a foot?

A. Yes.

Q. And this is only—how far from the semaphore pipe line?

A. Well, that is a foot and a half, I think would make it easy.

Q. Foot and a half.

A. That is just a guess, though.

[fol. 89] Q. Now I ask you——

Mr. Palmer (intg.): Just one moment; you can ask the question if it is not hearsay.

Mr. Duke: I was not asking a question. I was just making a statement so we could intelligently know what we were looking at.

The Court: Is there any question any juror desires to ask?

Mr. Duke:

Q. Now, Mr. Campbell, you state now that it is two feet and a half from the end of this rail, from the end of that hand rail to the track?

A. To the track.

Q. And it is 18 inches from the outside track to the semaphore line?

A. Yes; that is just a guess; that is close to it, that is what I say.

Q. It is one foot from the end of the semaphore line to that rail?

A. Yes.

Mr. Duke: That is all.

Cross-examination.

Mr. Palmer:

Q. Mr. Campbell, do you know anything about such a thing as standard clearance on the side of railroad cars?

A. No, sir, I don't know; I don't know what the standard is.

Q. You don't know anything about that?

A. No.

Q. You don't know whether or not there is a distance which, on the side of all railroad cars, is kept clear at all times on a railroad line which is called Standard Clearance?

A. I say I don't know what the standard is.

Q. You know there is such a thing?

A. There is such a thing, yes.

[fol. 90] Q. Do you know whether or not that contemplates the possibility of a man being on the side of a freight car, that clearance?

A. There would have to be clearance left for that, yes.

Q. I can prove that by some other witness.

A. That would be another fact.

Q. You say you never measured that distance?

A. I never measured that distance. I was just looking at it. Now I say I would figure it two and a half from the point of the rail to the track.

Mr. Palmer: That is all.

Mr. Duke: Mr. Campbell, just a minute. That is all.

Mr. Palmer: That is all.

The Court: You have no other witness but the expert, Mr. Duke?

Mr. Duke: That is all, your Honor.

The Court: Can we proceed?

Mr. Palmer: I don't see how we can a expert of the character he indicates he is going to call. I do not see how I can proceed without his testimony, that is, proceed and let his testimony come in later.

The Court: We will finish this case, when? Tomorrow morning?

Mr. Palmer: Easily.

The Court: After discussion it seems we cannot go much further, Ladies and Gentlemen of the Jury, therefore we will take an adjournment until ten o'clock tomorrow morning. Remember the admonition given on previous adjournments. (Repeating statutory admonitions.)

[fol. 91] Thursday, June 4th, 1931.

The Court: Will counsel stipulate that the jurors are all present?

Mr. Duke: Yes, your Honor.

Mr. Palmer: Yes, your Honor. There is one question I would like to ask Mr. Campbell on cross examination; may I ask that question?

The Court: Yes.

MICHAEL CAMPBELL, recalled on cross examination, testified as follows:

Mr. Palmer:

Q. Mr. Campbell, I think you stated you had been on that bridge for fifteen years?

A. I have been there since 1915 on this present bridge.

Q. Mr. Campbell, had there been any change in the in that stairway or railing in the years previous to the date of this accident?

A. No change since I have been there.

Q. No change in that stairway since 1915?

A. No, sir.

Mr. Palmer: That is all.

Mr. Duke:

Q. Any change in the lights?

Mr. Palmer: What lights?
Mr. Duke: Any lights on the bridge?

A. The only change is three top lights. There used to be battery, storage battery light, and now there is an oil light.

Q. Were there any lights on the stairways or on the bridge other than the two top lights?

A. No; no; never has been.

Q. Never at any time?

A. Never at any time.

Q. Who supplies the lanterns?

[fol. 92] A. The railroad company. You mean the lights?

Q. No, the lanterns you see?

A. The railroad company supplies them.

Q. They supply them?

A. Yes, they supply them.

Mr. Duke: That is all.
Mr. Palmer: That is all.

Howard G. Shelbley, sworn as a witness for plaintiff, testified as follows:

Mr. Cowen:

Q. Mr. Shelbley, where do you reside?

A. San Francisco.

Q. And what is your occupation?

A. Consulting engineer.

Q. And how long have you been an engineer?

A. About 33 years.

Q. And of what institutes of learning?

A. Stanford University and Harvard.

Q. What degree did you get at Stanford University?

A. I have a degree in civil engineering.

Q. What degree at Harvard?

A. Master of Engineering.

Q. Since the securing of these degrees have you been engaged in work as a consulting engineer?

A. In various capacities, as consulting engineer, resident engineer, associate engineer; various titles of that kind.

Q. Have you been engaged as an engineer in any of the departments of the state or its municipalities?

A. I served five years as superintendent of safety in the Industrial Accident Commission; superintendent of safety from '23 to '28.

[fol. 93] Q. And as superintendent of safety for the Industrial Accident Commission, Mr. Shelbley, have you made investigations of works, bridges and railroads and piers, wharves and railroad tracks?

A. To this extent, yes, I supervised made inspection personally of railroads that came within my jurisdiction, not under the jurisdiction of the railroad commission, such as lumber railroads and smaller industrial roads in use under the Interstate Commerce.

Q. Are you familiar with the safety requirements of those roads?

A. I certainly am, yes, sir.

Mr. Palmer: Which roads the ones that you inspected?

A. That is correct.

Mr. Cowen:

Q. Were you ever employed with any railroad company engaged in interstate commerce as an engineer?

A. Something over thirty years. I did work for Ohio Southern and Big Four road in southern Ohio.

Q. And you were familiar at that time with construction of railroad bridges and approaches?

A. With certain tracks. I was familiar with the conditions at that time.

Q. Did you work on any of those bridges?

A. I did not.

Q. Did you supervise the construction of any of them, or assist in the supervision?

A. I was quite young at that time.

Q. Have you made a study of safety devices and appliances?

A. I have.

Q. And you are able to tell this Court and jury the result of your experience in that line, are you?

A. I believe so.

Q. Mr. Sheibley, at my request did you make an examination of the railroad bridge at Black Point?

A. I did.

[fol. 94] Q. Which is the bridge that is in question here?

A. My understanding, yes.

Q. And from your investigation and inspection of that bridge, are you able to tell us whether in your opinion that bridge was originally as originally constructed was a safe place to work?

Mr. Palmer: That is objected to, if your Honor please, as incompetent, irrelevant and immaterial, not referring to the whole bridge; let us get down to what they refer to here.

The Court: Yes, direct the witness' attention to the stairway; that is the only thing under consideration here.

Mr. Cowen: Withdraw the question.

Q. Mr. Sheibley, did you make an investigation of the stairway on that bridge leading to the upper part wherein were contained the appliances used for opening and closing the draw of that bridge?

A. I believe I did, yes, sir.

Q. And from your investigation can you tell us whether those stairs at the time they were constructed were a reasonably safe place to work?

Mr. Palmer: One moment; if your Honor please, that is objected to as incompetent, irrelevant and immaterial, not a proper subject of expert testimony; it is a matter which any juror can see for himself, the Court or any juror. It is a matter of common knowledge whether or not a stairway has proper rails or smooth footing, whether anybody would be liable to fall there. That does not come within the subject of expert testimony, if your Honor please.

The Court (after discussion): Do you contend there is [fol. 95] any rule or regulation of the Railroad Commission or of any other board of body that sets up stairways in such cases as this?

Mr. Cowen: If your Honor please, there is a rule of the Industrial Accident Commission with reference to this particular—with reference to safe places of work.

The Court: Yes.

Mr. Cowen: We do not contend there is any rule of the Railroad Commission, and if there was such a rule——

The Court: I mean any other body?

Mr. Cowen: It would only be a rule of the Interstate Commerce Commission.

The Court: I included all this in my question. I said "any other body."

Mr. Cowen: We will prove by this witness, who we contend is qualified to prove the rule.

Mr. Palmer: Now just a minute——

The Court: Well, you may ask him questions direct to that point then.

Mr. Cowen:

Q. Mr. Sheibley, are you familiar with the rules of the Industrial Accident Commission with reference to platforms and places above any elevation as——

A. (Intg.) I am.

Q. (Contg.): To protection?

A. I am.

Q. Mr. Sheibling, I will ask you whether, in your opinion, the platform at the base of the stairs at that bridge was a safe place to work?

Mr. Palmer: Same objection, if your Honor please.

The Court: Yes, I will sustain the objection. Let me ask [fol. 96] you in your opinion would the platform and the stairway above it and the whole assemblage around there where the bridge tender would be required to go, does that conform with the rules of safety appliances as prescribed by law or by the rules and regulations of the Interstate Commerce Commission?

Mr. Palmer: Well——

The Court: You may object if you wish, for the sake of the record.

Mr. Palmer: All right; I think it should be confined to the regulations applicable to the defendant here.

The Court: Oh, undoubtedly.

Mr. Palmer: And the Industrial Accident Commission, the witness has stated their rules don't cover——

The Court (intg.): I did not say Industrial Accident Commission. I thought I said Interstate Commerce Commission. I am quite well aware that the Industrial Acci-

dent Commission, as well as the Railroad Commission, have no authority in the matter. Now with that correction—if I made that statement, it was a mistake on my part.

Mr. Palmer: There might be the further objection that the rules would be the best evidence rather than this witness' recollection of any rules.

The Court: I assume the rules may be introduced; he is familiar with them, and I think the question in that form is proper. Let him answer the question.

Mr. Palmer:

Q: Do you understand the question, Mr. Witness?

A. Your Honor, I am not exactly clear in my mind just [fol. 97] how you are limiting me in reference to rules. You have already stated that I would not be qualified to testify as to rules, say, under the jurisdiction of the Interstate Commerce Commission.

The Court: I have not made any ruling at all in that regard; no questions have been asked you about that.

A. I was——

Q. (Intg.) Are you familiar with those rules and the requirements?

A. As to safe places for work?

Q. Yes.

A. Yes; yes.

Mr. Palmer: One moment, may I ask a question?

The Court: Yes.

Mr. Palmer:

Q. The rules of the Interstate Commerce Commission?

A. I do not say so.

Q. What rules did you say you are familiar with?

A. With the orders of the Industrial Accident Commission of the State of California.

Q. And those are the rules you have reference to?

A. Correct. Your Honor, may I have the question again so that I can frame an answer?

The Court: Read the question, Miss Reporter.

(Read.)

Mr. Palmer: That does not include, as I understand, the rules of the Industrial Accident Commission?

The Court: No.

Mr. Cowen:

Q. Answer the question.

A. Well, your Honor, I want to be correct in my answer. I would be tempted to say yes, yet I would like to make a certain qualifications to that statement.

The Court: You may answer fully.

[Tol 98] A. If I am to eliminate any reference to any state standards or any common standard, I would have to resort to my opinion based upon the accepted standard.

Q. By whom, accepted by whom?

A. Industry in general in all branches.

Q. And those branches include what?

A. Railroad, if you eliminate the jurisdiction.

Q. Yes.

A. Cement plants, mines, bunkers; all sorts of industries.

Q. Building construction?

A. Building construction, yes, sir. It is a very wide and general subject, but would be quite inclusive; I am familiar with all branches.

Mr. Cowen:

Q. Mr. Shelbley, I will ask you if you examined the steps, and particularly the last three or four steps, upon this bridge?

A. I did.

Q. And what did you find there?

Mr. Palmer: One moment; if your Honor please, if this is confined to what he saw there, it is quite all right, but his opinion as to whether or not they are safe, I will make the same objection.

The Court: He asked what he saw.

Mr. Palmer: Yes, just what you saw, please.

A. As I looked at the stairs, the stairs are about so wide, without being specific as to width, and on each tread there are a number of buttons that are pushed up through the

middle, and on the last three steps the treads, in particular on the outer edge; the nose, they are fairly well worn.

[fol. 99] Q. What was the buttons?

A. The nose. The nose is very well worn; the point has been worn off, and the steel itself has been worn smooth on the edge and the buttons in line with the two feet come down are pressed in and worn smooth on particularly the last three treads. On the last tread, as I remember, the button has almost disappeared just a little protuberance.

Mr. Cowen:

Q. Mr. Sheibley, did you examine the platform at the base of the steps?

A. I did.

Q. Will you tell us what you found there?

A. The buttons adjacent to the lower step or tread and about in position where a shoe would strike it, the buttons are fairly well worn and smooth and under the feel of the finger they are fairly slippery.

Q. Did you examine the rail alongside of the steps?

A. I did.

Q. Did you examine the rail at the platform at the base of the steps?

A. I did.

Q. Do you know how high that rail is from the top to the base, top of the platform to the base?

A. About three feet.

Q. Mr. Sheibley, I will ask you, based upon your examination of this of these steps and that platform and your experience as an engineer, would you say that those steps and that platform are a safe place in which a man could work?

Mr. Palmer: Just a moment; That is objected to as immaterial, irrelevant and incompetent, not the subject of expert or opinion testimony; the same question which was asked a while back.

The Court: Well, now the objection was a while ago, and the argument was made that this witness was not familiar with the rules and requirements of the Interstate Commerce [fol. 100] Commission in regard to safety appliances and therefore could not answer whether or not this situation up there conformed with those rules and regulations.

Mr. Palmer: Exactly.

The Court: Now the question here, I take it, for the jury to determine is one of negligence.

Mr. Palmer: That is the question.

The Court: Now could the railroad maintain a place no matter how insecure it might be as long as it did not violate any rule or regulation of the Interstate Commerce Commission, or isn't there a duty cast on them, aside from and independent of the rules and regulations and requirements of the Interstate Commerce Commission?

Mr. Palmer: Certainly, your Honor.

Mr. Cowen (after discussion): I will withdraw the question and reframe it. Mr. Sheibley, based upon your examination of this bridge and your experience as a safety engineer, and based upon the further fact that at the time this bridge was constructed and the structures approaching that bridge, that they contain corrugated—what we refer to as corrugated steel plates of non-skid type

A. (Intg.) Yes.

Q. (Contg.): And based upon the further fact that that bridge was upon an open waterway and subject to being dampened by fog and other elements; and based upon the further fact that these buttons were subject to being worn down, what in your opinion would you say the condition of those steps was at the present time?

Mr. Palmer: Same objection, if your Honor please. Ask [fol. 101] him *him* if he knows that other structures of similar type have more safeguards.

The Court: I was about to put the question: Mr. Sheibley, comparing the situation as you found it and as it has just been related in the last question by counsel surrounding the bridge and stairway at the Black Point bridge, comparing that situation with the safety appliances in use and proved in other lines of industry, how would you say that the place compares with—as a place of safety with those used in the other lines of industry?

Mr. Palmer: In what particulars. How, I might say, is not as safe,—that is what I object to.

The Court: Well, I think if he has to use that word, I suppose he will. What I want him to do is to compare the situation there where a workman is required to pass back and forth night and day and at other times in the course of his duty, whenever called on, with the situation as described

in the question just propounded to him by counsel. How does that compare with the requirements that are in usual vogue in other lines of industry? Can you answer?

A. I can answer it?

Q. Yes.

A. I would like to start with the platform railing. First the states in all industries I am familiar with throughout the State of California, and the same standard is adopted by insurance companies of other states, I would be required to provide a rail 42 inches high; and that rail is six inches shy of it. In other words, 42 inches brings the top rail about the middle of the side, just below the ribs, and brings the center of gravity in line with or below the top rail, so if a [fol. 102] man has a tendency to fall, with the rail as it is on the average momentum, this momentum would have a tendency to tip a man over. The top rail is too low. The standard also requires a double rail on all platforms over four feet above any elevation below, which would require an intermediate rail approximately 21 inches. There is no official defines, but the purpose is to put it midway. It may be more or less than 21 inches. So this railing on the platform was absolutely deficient under the customary practice in all industry on platforms above four feet; and on platforms six feet and more, it is customary also to provide a toe board.

Q. What is a toe board?

A. A toe board is a strip of material or wood approximately six inches high that is placed along the edge of the platform, but it may be placed there for other reasons than slipping, so I would not care to stress that, excepting to point out the fact that that toe board is required on platforms six feet and more, but they generally have in mind in other industries working places below the platform, which largely accounts for the demand for the toe board. But in a case of this kind, either that middle rail should have been put in there, or a mesh of some kind to protect a man going through. But even though there had been, the rail would not be the proper standard due to the fact it is too low, for if a man fell over the railing the center of gravity of his body would be too high, and he would have a tendency to roll through there, so it should be 42 inches, and it is only 36 inches. The company when they built the bridge undoubtedly had in mind absolutely and decidedly the slipper-

iness on the platform and the dangers, owing to the fact [fol. 103] they provided so-called foot plates known as M— plates, with these buttons pushed up through the plates, to furnish a non-skid surface. They have a better device now, but that is reasonable good practice, as far as that is concerned, and the objection I would have would be to the fact that the non-skid or not-skid surface was not maintained, due to the fact that these buttons were allowed to wear, to become non-effective.

Mr. Cowen: That is all.

The Court:

Q. The buttons are still there, are they not?
A. Yes, sir.

Mr. Palmer: Mr. Sheibley——

Mr. Cowen (intg.):

Q. Are you familiar with the custom and practice in industries about the lighting of passageways and stairways?
A. I am.
Q. Will you tell us whether or not it is necessary to light a passageway or structure consisting of 34 or 35 steps?

Mr. Palmer: One moment, if your Honor please, it has got to be confined to the situation here. A stairway in a house where people are going up and down all the time, and a place on a bridge where there is only one man going up there, they certainly don't compare.

The Court: Explain in your answer an open-air stairway, such as the one you saw up there.

A. It is customary to make obligatory requirements on all industries having structures that are used as a part of the place of employment, where a man must go from one point to another point, and it is not customary to depend upon flash lights or lanterns or any means which he might [fol. 104] provide himself, but to furnish others when it is dark; not necessary where the moon shines. Possibly there might be provisions made in the order to eliminate artificial means of lighting, but it is customary to fix— or usual, by order of the Commission in the State of California, for

instance, to provide a fixed light in position to light up the stairs and platforms that are used as a part of the place of employment, where a man has to move, as I say, from one point to another, where he has to use it, and particularly where he has to act quickly and in a hurry, and is not always in position to properly negotiate and handle himself.

Mr. Cowen: No further questions.

Cross-examination.

Mr. Palmer:

Q. Now, Mr. Sheibley, do you know anything about bridges over navigable waters and the type of lights which can or cannot be placed on bridges where boats are to go through; do you know anything about that?

A. Well, I can sense the situation.

Q. Do you know anything about it from your experience or any opportunity of observation you have had on bridges where they are required to permit steamers to go through?

A. Well, I do know this, that it is customary to provide plenty of light.

Q. Do you know anything about the character of lights or type of lights that must be placed upon bridges,—I mean the portion that is out in the middle of the stream; that is what I am talking about.

A. I would prefer not to be specific without further investigation.

Q. Why no. Don't you know there are certain types of [fol. 105] navigation laws that have to be followed and certain requirements with regard to lights which will not confuse the shipping going through there. Don't you know that. Well, then, you have no knowledge, do you, and you cannot tell this jury now just what lights have to be and cannot be on bridge structures out in the middle of a draw?

A. I would not care to answer that question.

Q. No; and you do not know, then, to say it would be proper regulations of the federal government upon navigation to permit certain types of lights on a structure out in the middle of a stream—you don't know that?

A. I could not answer.

Mr. Duke: Well

Mr. Palmer (intg.): This is cross examination. This type of structure you saw.

The Court: You say "certain types of lights," do you mean any lights?

Mr. Palmer: He has testified you should have lights. I am saying he does not know anything about the regulations with regard to the absence of lights on structures of that kind. That is what I am talking about.

Q. You recognize this is a drawbridge and that steamers go through there?

A. Yes, sir.

Q. Do you know anything about the fact there are frequent fogs up in that territory?

A. Yes, sir.

Q. And that the navigators of the steamers have to guide by certain types of lights going through there?

A. I assume that is true.

Q. Why, certainly. Now what bridge do you know, can [fol. 106] you draw attention to now, a bridge of this character, railroad bridge, where they have a different kind of stairway than this one right here, where the bridge tender has to go up to the house up above?

A. I prefer not to answer that, your Honor.

Q. Do you know any?

A. I prefer not to answer it.

Q. You have to answer the question. I insist that an answer be given.

The Court: Just read the question.

(Question partially read.)

Mr. Palmer: I will reframe my question. Do you know of any bridge, any railroad bridge of this character where the stairway has any further safety facilities than this particular stairway here? That is my question.

Mr. Cowen: I object to the question on the ground it is incompetent, irrelevant and immaterial, and not proper cross examination.

The Court: He compared the situation up here with that of industry in general. He did not say that he knew about the rules of the Interstate Commerce Commission, and they,

of course, govern in the cases of railroad bridges, except logging roads and others that are entirely within his scope; he did not say he knew anything about railroad bridges.

Mr. Palmer:

Q. Then for all you know, Mr. Witness, this is a common stairway, type of stairway, that is in use on all railroad bridges throughout the United States?

Mr. Cowen: Just a minute.

Mr. Palmer (Intg.): It is a perfectly fair question.

[fol. 107] The Court: Just a minute.

Mr. Cowen: I object to the question on the ground it is not proper cross-examination. This jury is not concerned with what any other railroad did or what any other person did. They are only concerned here with whether this bridge was negligently maintained or negligently constructed and what anybody else did under the circumstances is not a fair test of negligence.

Mr. Palmer: I want to bring out the standard in this industry.

The Court: Standard in railroad construction?

Mr. Palmer: Railroad bridges.

The Court: Yes.

Mr. Palmer:

Q. For all you know this is a common, standard type of structure on all railroad bridges in the United States?

Mr. Cowen: Same objection, if your Honor please; and on the further ground it is argumentative.

The Court: I will ask the question this way: Do you know what type of bridge stairways are used on draw bridges similar to this one on other railroads?

A. To be fair, your Honor, I would prefer to state——

Q. (Intg.) You may answer yes or no. Do you know what types of stairways are used in bridges similar to this on other railroads in the United States?

A. No, sir, with the qualification, not definitely.

Q. Well, explain.

A. I have been around drawbridges. From memory I would not feel confident to state whether this particular

stairway was similar to other stairways on other similar [fol. 108] bridges. I would not trust my memory. My thought is that if that is a standard, it is a very poor standard, and it would be unsafe whether it is common practice or not.

Mr. Palmer: We ask that past part be stricken out as not responsive to the question.

The Court: All right; it is not responsive; it may go out.

Mr. Palmer:

Q. Now, Mr. Witness, you say those knobs are all worn down there at the foot of the stairs?

Mr. Cowen: Just a moment; I object to the question on the ground it is assuming something not in evidence.

The Court: The witness is an intelligent man; he can explain.

Mr. Palmer:

Q. Do you want this jury to believe you went up there and saw those all worn down there?

Mr. Cowen: That is not his testimony.

Mr. Palmer:

Q. What di you say?

A. Far from being all worn, many of them are in very good condition.

Q. You saw many of them worn down flat?

A. Yes, I think there are two there fairly flat.

Q. What do you mean "Two there fairly flat"?

A. The top of the bulge in the stair is gone.

Q. The knob sticks up above the surface of the stairway in every instance, does it not?

A. To some extent.

Q. Then you don't mean they are worn down to the level of the deck?

A. That is not what I say.

The Court: I think the witness testified that the circular [fol. 109] on the top surface, these bulges were not circular on top, the surface of these bulges has been worn flat, isn't that your testimony?

A. Yes, exactly, but not every flat with the tread.

Q. But the crown that was formerly on them has disappeared so they are straight across instead of humped in the center?

A. Yes.

Mr. Palmer:

Q. What is the diameter of these knobs, do you know?

A. I would say roughly three quarters of an inch.

Q. Roughly three quarters of an inch; and you say on some of them the rounded surface has been worn so there is a flat surface on top of them?

A. That is correct.

Q. That is correct. I agree with you. Now these stairways you refer to, steel stairways you refer to, are stairways in buildings, bunkers and things like that, where employees are going up and down continuously?

A. Not necessarily.

Q. Largely?

A. That is a specific reference, but the same argument applies to even temporary stairways, on construction, for instance, the same standards apply.

Q. Stairways where various different employees go up and down?

A. That is correct.

Q. Many stairways have even ladders that are maintained in industries for certain employees with special duties, to go up and down?

A. That is true.

Q. A great many industries that have just hand rails that the employee climbs up to the top?

A. That is true.

Q. A single employee?

A. That is true.

[fol. 110] Q. That is quite a standard—I withdraw that. It is quite frequently done?

A. Occasionally, yes.

Q. There is a difference between a stairway that a single employee at certain times, or passage way, goes up to do a certain duty, and a stairway in a building that is constantly used by various different employees and by the public?

A. There are not many standards apply to the public. Of course you understand while such a method of moving

from one floor to another might be allowed, it might not follow that it would be safe practice.

Q. Well, it is seen all the time where just one employee has to go up and do a certain duty, is it not?

A. If he has all the time to do it, yes.

Q. And very frequently only ladders or, just as I say, hand runs fastened to the wall, that they go up, isn't that quite commonly seen in factories and different places?

A. I cannot say commonly seen; it is frequently seen.

A. And these stairways you have reference to are ones in rather heavy—that are used rather heavily by the different employees?

A. No, that is not necessarily true, when you say "heavily." A man might use it once a day and it still in the ordinary sense it becomes a hazard. We are not talking about using it once or twice but we are talking about the hazard in the place of employment.

Q. There are hundreds of places where there are just ladders for the employees to go——

A. (Intg.) I would not care to go up unless I saw the ladder and the place. Those I would measure up by lad-

[fol. 111] ders as not being safe.

Q. They are permitted by the Industrial Accident Commission in hundred- of factories.

A. Under certain conditions.

Q. Just ladders for employees to go up?

A. Under certain conditons.

Q. Conditions where they don't have to use them very frequently, isn't that true?

A. No, that is not the fact.

Q. Hundreds of establishments where they permit a ladder instead of a stairway, with all these graded areas?

Mr. Cowen: I object to the question as not proper cross-examination.

The Court: Overruled.

A. I would say the use of the ladder is dependent upon the conditions surrounding the employment. There are places where a ladder is safe, provided it is used properly, but if a man has a routine that he follows through day after day and he must move rather rapidly at times, it is customary to require a permanent stairway rather than

a ladder. It is a hard question to answer because the answer depends upon the specific conditions.

Mr. Palmer: Exactly.

The Court: You mean the ladder is more or less used as a temporary or casual use than a permanent one?

A. Exactly. Wherever it is a permanent use, stairways are required. I won't say it is a general rule, but where a stairway would be in the way where your operations take place, you might have to take the stairway out; then a ladder is the only thing that will function, and you have [fol. 112] to overlook certain elements of safety in order to make the thing practical. It is largely a question of what the operation, what the conditions are.

Mr. Palmer: That is all.

Mr. Cowen: That is all.

The Court: That is all.

Mr. Duke: We rest.

Mr. Palmer: Your Honor, we might excuse the jury a few moments, I have a matter I would like to take up with the Court.

The Court: All right, the jury will remain outside the courtroom, but within call. Counsel will stipulate the jury is fully admonished?

Mr. Palmer: Yes, your Honor.

The Court: All right.

(Jurors retire.)

Defendant's Motion for Nonsuit

Mr. Palmer: If the Court please, on behalf of the defendant I move for a non-suit on the particular grounds, first, that the evidence in this case fails to disclose any negligence on the part of the defendant. Second that the evidence wholly fails to show that any negligence—assuming any negligence to have been proved—proximately contributed to the death of the deceased, and that the cause of death has not been traced to any negligence and it is pure speculation. Third, that the complaint in this case affirmatively shows that the plaintiff—not the plaintiff

but the deceased—assumed the risk of the negligence or the situation which is claimed to have been negligent at the time and place of the accident, and therefore, they may not recover. Fourth, that the evidence introduced on plaintiff's own part, plaintiff's own evi-[fol. 113] dence, shows as a matter or law that he assumed the risk of the stairway, the conditions there on the bridge, and that, therefore, under the Federal Employers' Liability Act he cannot recover. Now I won't dwell on the first point as to whether or not there is any negligence in my argument, but I will proceed at once to the point which I think conclusively establishes that plaintiff cannot recover. There is no showing here that the conditions of that stairway was the cause of death—assuming that to have been negligent, was the cause of the death of the decedent. You will recall there is no proof as to the cause of death.

The Court: Drowning.

Mr. Palmer: I contend, if your Honor please, that the testimony of Dr. Kuser does not establish that at all. He said he gave that because he had no other cause. He said he could not say whether or not the man might have died of heart failure or other causes. He could not say, and from his examination which eliminated all they could, gave his opinion it was drowning, but he would not say there might have been other causes of death. That is his testimony as I recall it.

The Court: I think there is a fair preponderance of evidence that drowning is the cause.

(After argument.)

I will deny your motion. It will not be necessary to call the jury in; I think they were admonished before they left.

Mr. Palmer: Yes.

Mr. Duke: Yes.

Mr. Palmer: Are they still there?

[fol. 114] The Court: I don't know. If they are, the bailiff might tell them to have their lunch and return at 1:45.

(Noon recess.)

1:47 P. M., all parties being present, the following proceedings were had and taken:

The Court: It is stipulated all jurors are present?
Mr. Palmer: Yes, your Honor.
Mr. Duke: So stipulated.

HERBERT I. BENJAMIN, sworn as a witness for defendant, testified as follows:

Mr. Palmer:

Q. Your name is Herbert I. Benjamin?
A. Yes, sir.
Q. And what is your occupation, Mr. Benjamin?
A. Assistant engineer of bridges, Southern Pacific Co.
Q. How long have you held that position?
A. For three and a half or four years.
Q. And does that—what are your duties, what do they comprise?
A. The designing and detailing of steel bridges, bridges of all kinds, structures, and construction of all kinds, bridges and structures.
Q. For how long a time have you been connected with bridge designing and construction and so forth?
A. Since 1908.
Q. Are you a graduate engineer, Mr. Benjamin?
A. From the University of New York.
Q. In the course of your business have you studied the different types of bridges, including railroad bridges, throughout the country?
A. I have.
Q. Including the stairways and other appurtenances to a bridge?
[fol. 115] Q. That is included in the bridge design?
Q. Have you had occasion to examine the bridge of the Northwestern Pacific Railroad Co. over the Black Point—at Black Point or at Grand View?
A. I was out there this morning.
Q. And did you have occasion to examine as to the plans of that bridge?
A. I saw those this morning, too.
Q. What character of bridge is it?
A. That is a swing span, draw span, constructed by the American Bridge Co.

Q. It is constructed by the American Bridge Co.?

A. Fabricated by the American Bridge Co.

Q. What is the American Bridge Co.?

A. It is probably the largest fabricator and constructor of bridges in the United States.

Q. Was the stairway and railing and so forth designed and constructed by the American Bridge Co.?

A. Yes, according to the plans. The plans show both the stairway and the railing.

Q. I will ask you whether or not that stair, railing and so forth is a standard type stairway and railing for use on railroad bridges as designed by the American Bridge Co.?

A. It is one of their standards.

Mr. Duke: One moment; it is objected to on the ground it is incompetent, irrelevant and immaterial.

Mr. Palmer: Submit the objection.

The Court: We had something like that up for ruling this morning, I think, one of the types commonly used would not answer any question here, would it?

Mr. Palmer: Certainly it would, your Honor.

[fol. 116] The Court: Of course, it is up to the jury to determine whether or not it is safe today. They would not allow an expert on the other side to say anything was safe compared to the rules and regulations and conditions in other lines of industry.

Mr. Palmer: That is what I am trying to do here, by showing that in the railroad line of industry this is a recognized standard type of bridge.

Mr. Duke: That isn't an issue.

Mr. Palmer: That is not an issue, but that goes to show whether or not due care was used in its selection and design.

Mr. Duke: We are concerned——

Mr. Palmer (contg.): I am not asking him whether it is safe or unsafe.

Mr. Duke: We are concerned with one part of that bridge, the steps and platform.

Mr. Palmer: It is what I am asking him.

The Court: All right, confine your question to the steps and platform.

Mr. Palmer:

Q. I will ask whether or not the steps and platform on that bridge are standard?

A. It is one of the standard types.

Q. I will ask you whether or not that stairway and railing is in general use throughout the United States on railroad bridges?

Mr. Cowen: One moment; I object to the question on the ground it is incompetent, irrelevant and immaterial; it is not within the issues.

The Court: How would that enlighten the jury, Mr. Palmer?

[fol. 117] Mr. Palmer: The duty of this defendant is to use the same degree of care that an ordinarily reasonable, prudent person in a business would use. To show that is the usual and customary type of bridge would certainly be of value. (After discussion) Now the only people who are situated in the same circumstances the only people who are situated in similar circumstances are the other railroads, and what they do is certainly of value; the jury can thus determine whether or not it is safe.

The Court: It is not binding upon them in any way. It is merely to throw such light on the question that they must determine as is possible to be had from such an answer.

Mr. Palmer: Exactly; that is the purpose of the question only.

Mr. Cowen: May I just add this one further point, if your Honor please, the fact that any other or every other railroad company in this land has the same type of bridge and that is standard amongst those railroads does not enlighten us as to whether that bridge was negligently constructed or negligently maintained.

Mr. Palmer: All right, we will put that shoe on the other foot.

The Court: I think I will let it go to the jury, with the suggestion all this is a matter of argument that you may bring to them, for what light it will throw on the situation, I will——

Mr. Cowen (intg.): We withdraw our objection to it.

Mr. Palmer: Will you read the question, please?

(Question read.)

A. Yes, one of the kinds that is used commonly.

[fol. 118] Q. And is that—now, Mr. Benjamin, with reference to the clearance; is there a regulation requiring certain clearance on either side of the train on bridge structures?

Mr. Cowen: Just a moment; we object to that question on the ground it is incompetent, irrelevant and immaterial, not within the issues.

Mr. Palmer: But, your Honor, it is trying to answer him. They are trying to bring in about that railing.

The Court: There was something in the case yesterday about the kind of clearance and the point "C", if any, between the platform and the railroad.

Mr. Cowen: It was brought out by a juror.

Mr. Palmer: All right, I want to enlighten him; that is the purpose of bringing the witness here.

Mr. Cowen: Withdraw the objection.

A. There is a ruling of the California Railroad Commission requiring a clearance of 7½ feet for each side of the center line of the track.

Mr. Palmer:

Q. In other words, everything must be clear within a distance of 7½ feet on each side of the center line of the track?

A. That is right.

Q. Now will you tell me what the clearance was between those bridge uprights or trusses, averages on that bridge on the——

A. (Intg.) 7½ feet; 15 feet in the clear.

Q. Fifteen feet wide; and in regard to that little hand rail, that is about how far back from the center of the track?

A. Probably a few inches more than the 7½ feet required.

[fol. 119] Q. And under the rules and regulations of the Commission, nothing, including that hand rail, could be nearer the center of the track than 7½ feet, is that correct?

A. Nothing may be closer.

The Court:

Q. Nothing—what?

A. Nothing may be closer.

Q. Does that apply below the level of the rail or above?
A. That applies from a distance of about 2½ or 3 feet above the rail up.

Mr. Palmer:

Q. And what is the purpose of the requirement of that clearance, if you know?
A. In case a brakeman is on the side of the car that he will not be struck by any projecting piece of steel, or anything at all.
Q. It is a safety regulation?
A. It is a safety regulation.
Q. Brought down by the Commission?
A. Yes, sir.
Q. And has been complied with on that bridge?
A. Yes, sir.

Mr. Palmer: That is all.
Mr. Cowen: That is all. No questions.
Mr. Palmer: That is all, Mr. Benjamin. Call Mr. Campbell.

Michael Campbell, recalled by defendant, testified as follows:

Mr. Palmer:

Q. Mr. Campbell, you say you have been on the bridge 15 years?
A. Yes, sir.
Q. 16 years.
A. About 16 years.
Q. Been up and down that staircase every day?
A. Every day.
[fol. 120] Q. Ever slip on it?
A. Ever slip? No, never fell down.
Q. Have you ever known of an accident to take place on those steps during all the time you have been on that Bridge?
A. Never.

Mr. Cowen: I object to that as utterly irrelevant and incompetent to any issue here involved.

Mr. Palmer:

Q. Have you ever known anybody to slip or fall on those steps on that bridge during all that period of time?

Mr. Cowen: Same objection.

The Court: Will that enlighten the jury any?

Mr. Palmer: Certainly. The question is, "Is it a dangerous place to work?" Now the operation of that stairway is one of the prime considerations as to whether or not it is dangerous. I want to know if he

The Court (intg.): I will allow the question.

A. No, sir, never had any accident to my knowledge there before.

Mr. Palmer:

Q. Now you reside right close to that bridge, don't you?
A. About three city blocks from it.
Q. You have lived there all that time?
A. I have lived there about 15 years; maybe more.

Mr. Palmer: That is all, Mr. Campbell.

Mr. Cowen:

Q. Mr. Campbell, you are still in the employ of the rail road, aren't you?
A. Yes, sir.

Mr. Cowen: That is all.
Mr. Palmer: That is all. Mr. Lowe.

[fol. 121] E. L. Lowe, recalled by defendant, testified as follows:

Mr. Palmer:

Q. Mr. Lowe, you worked on that bridge as a bridge tender up to how long ago?
A. August 23rd last.
Q. Of 1930?
A. Yes, sir.
Q. And how long were you on the bridge?
A. Little over six years.

Q. And you went up and down those steps?

A. Yes, sir.

Q. In the dark and in the light?

A. Yes, sir.

Q. Did you ever slip on there?

A. No, I never have.

Q. And did you ever know of an accident ever taking place on those steps by anybody falling on those steps, to your knowledge?

A. Not to my knowledge.

Mr. Palmer: That is all.

Cross examination.

Mr. Cowen:

Q. Mr. Lowe, in coming down those steps, how did you come down?

A. How do you come down?

Q. Yes, how did you come down?

A. Took hold of the banister and simply walked down like you would any other stairs.

Q. Took hold of one banister?

A. Well, always one.

Q. Did you come

A. (Contg.): When my hands were not occupied, I took hold of the two.

Q. Did you come down one step at a time?

A. One step at a time.

Q. During what hours of the day did you work on that bridge?

A. Well, I had three years there, or thereabouts, little over three years of night work from nine p. m. to five a. m.; the rest of my time was day work, from one p. m. to nine p. m.

[fol. 122] Q. And during the time that you worked from nine p. m. to five a. m., during the periods of, say, the latter part of January and the early part of February would the bridge be wet?

A. Yes.

Q. How about the steps?

A. Well, they are always wet at night; that is, little wet after midnight, and in the winter time more or less dampness.

Q. Now with reference to the vision, could you see those steps with the use of a light?

A. I always used the lights.

Q. And how did you use the light; what position did you carry it?

A. Carried it generally in my left hand.

Q. In your left hand?

A. Yes.

Q. And where was the lines of your light, on the bottom or to the side?

A. The lantern I used was a round light; the light shows from all sides of it.

Q. And you would hold it on your wrist?

A. I held it in my hand; hand hold.

Q. Where did you hold it, before you or to your side?

A. Generally to my side.

Q. When you went down, you were quite careful how you walked down those steps?

A. I was always careful, yes, sir.

Q. And you never slipped at all?

A. I never slipped there.

Q. You are quite positive about that?

A. Quite positive of that.

Q. You never told Mr. Duke you slipped on those steps?

A. I don't think so.

Q. Never told Mr. O'Connor you slipped on those steps?

[fol. 123] A. I don't think so.

Q. Did you ever tell Mr. Duke?

Mr. Palmer: I haven't got the condition he told Mr. Duke?

A. I am—I do not say I haven't probably made a misstep but I have never had any accident.

Mr. Cowen:

Q. That is what I wanted to get at, Mr. Lowe.

A. I may have told them I made a misstep. I don't know any man who went up and down any steps many times when he didn't make a misstep, but I never had any accident.

Mr. Cowen: That is all.

Redirect examination.

Mr. Palmer:

Q. In other words, you never slipped so as to loose your balance?

A. No, nothing like an accident.

Q. Mr. Lowe, that is a rather steep stairway?

A. Rather steep stairway.

Q. And the rails are pretty close to that bridge, the hand rails?

A. Yes.

Q. And in walking down there you have to keep your hands outside of those rails, don't you? You cannot——

A. (Intg.) I always took—kept hold of the rail and never let my hand slip or anything. No, never.

Q. It was do the work?

A. There was danger of my hand slipping when I came to these projections; I just let go. I have run down those stairs many times and I always——

The Court:

Q. (Intg.) Does your occupation call for you to run down sometimes?

A. I don't know whether they really call for it, to run down, but I always, in case of having a train held up, I [fol. 124] would come down as lively as I can with safety.

Mr. Cowen:

Q. And when you received a signal from a boat, when you went to the draw of the bridge, didn't you have to move pretty fast; didn't you?

A. Well, you have to step along so as to have that bridge open by the time the boat is there after he has given you the signal.

Q. It is necessary for you to go to both ends of the bridge?

A. Not in opening.

Q. Wasn't it necessary in opening?

A. No, sir.

Q. How did the semaphore signals become released?

A. Release them from upstairs, the first thing you did after you went upstairs, by throwing a lever.

Q. Did they always open?

A. Always opened.

Q. You never knew of any time when it was necessary for you to go downstairs to see if the signals were opening?

A. Not in opening your semaphores, raising your semaphores.

Q. How about after the bridge is closed?

A. After the bridge is closed, you come down, go to both ends of the bridge to see that your rails are down, then you throw your semaphore lever again.

Q. Then you go upstairs?

A. Then you go upstairs, yes, sir.

Q. So you had to make a pair of trips up and down those steps when you were in the act of opening and closing that bridge?

A. Go up upon that bridge, come down when you have closed it to see if your rails were closed, and up again. You make four trips.

Mr. Palmer:

Q. Two trips up and down?

A. Yes, sir.

[fol. 125] Mr. Cowen: That is all.

Mr. Palmer:

Q. You don't make a trip to open the bridge?

A. No, sir.

Q. You just went up?

A. I just went up.

Q. After the bridge was closed you came down, and went to either end and fixed it?

A. That's the idea, sir.

Q. To this day you never had any difficulty on those steps?

A. I never had a fall on those steps.

Mr. Palmer: That is all.

Mr. Cowen: That is all.

LUCIUS J. KOHL, sworn as a witness for defendant, testified as follows:

Mr. Palmer:

Q. Mr. Kohl, what is your business or occupation?
A. Civil engineer.
Q. By whom are you employed?
A. Northwestern Pacific Railroad Company.
Q. Mr. Kohl, did you, at my request, go to the Black Point bridge and figure the steps on that stairway leading up to the engine house?
A. Yes, sir.
Q. And at what angle does that stairway stand?
A. 48½ degrees angle to the horizontal.
Q. Did you also at my request measure the height of those steps,—in other words, the vertical distance from one step to another?
A. Yes, sir.
Q. What is that?
A. Nine inches.
Q. Did you also measure the width of the step,—in other [fol. 126] words, from the back of the step to the front of the step; what is that?
A. Eight inches.
Q. And did you—that is all.

Cross-examination.

Mr. Cowen:

Q. Did you measure the length of the step?
A. The total length?
Q. Yes.
A. Yes, sir.
Q. What is that length?
A. Oh, the length! No, I measured the vertical and horizontal height. I can calculate the length. It is around 33 feet.
Q. You just calculated that?
A. There are 35 steps.

The Court:

Q. The vertical height is how much, about how much?
A. Well, I might miss it a foot. I have it right here. I

can get it in a second. The vertical heights is 26 feet 3 inches.

Mr. Cowen:

Q. Did you examine the steps?
A. Yes.

Mr. Palmer: Objected to as not cross examination, if your Honor please.

The Court: He only asked about the height and the angle.

Mr. Cowen: Just one more question, then. Did you measure the length of each step?

The Court: That is, the width of the stairway?

A. The width of the stairway?

Mr. Cowen:

Q. You have given is the width, which is 8
A. (Intg.) Yes, I have that.
Q. What is that?
A. 20½, isn't it. 21½ inches.
Q. 21½ inches?
A. Between the channel horses.
Q. Did you ever go to that bridge before?
[fol. 127] A. Yes, several times.
Q. Ever make an inspection of the bridge before?
A. No, not

The Court (intg.): The bridge or the stairway?

Mr. Cowen: I mean the stairway.

A. No, I never made any inspection of the stairway.

Mr. Cowen: That is all.

Mr. Palmer:

Q. Mr. Kohl, do you remember the approximate width between tips of the hand rail?
A. Yes, sir.
Q. What is that?
A. Slightly variable, but around 17 to 18 inches.

Mr. Palmer: That is all.

Mr. Cowen:

Q. You mean the hand rail coming down on the steps?
A. Yes.
Q. Did you measure the rail at the base of the platform?

Mr. Palmer: The height of it?

A. You mean the hand rail?
Q. Yes.
A. Yes.
Q. What is the height of the hand rail to the base?
A. About three feet one inch to the upper surface of the rail.

Mr. Palmer: That is all.
Mr. Cowen: That is all.

Mr. Palmer: Defendant rests, your Honor.
Mr. Duke: Plaintiff rests.
The Court: Proceed to argument.

(Argument.)

[fol. 128] The Court: It is stipulated the charge of the Court may be delivered orally?
Mr. Palmer: Yes, your Honor.

CHARGE TO JURY

The Court: Ladies and Gentlemen of the Jury: You will give me your careful attention. It is my duty to state to you the law applicable to this case, and it is your duty, unaided by any suggestion from me, to pass upon all question of fact. Neither the judge nor jury may trespass upon the province of the other. Our provinces are entirely distinct and separate, and you will understand that in this charge, or in anything I may have said during the course of the trial, the Court in no manner or form is expressing or desirous of expressing any opinion upon the weight of evidence or on any part of it, or on the truth or falsity of any witness' testimony, or that any alleged fact in the case is or is not proved. With the questions of fact, the weight of evidence, the credit which you should give to any witness sworn in the case, the court has nothing to do. These are

matters strictly within your province, and which you, as jurors, under your oaths, must determine for yourselves.

This is a civil action, and in civil cases the affirmative of the issue must be proven. The affirmative here is upon the plaintiff. On the plaintiff, therefore, rests the burden of proof.

You are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds.

By a preponderance of evidence is meant not the greater [fol. 129] number of witnesses but the greater weight of evidence. It is not necessary, in order to arrive at a verdict, that your minds be free from all doubt. It is your duty to decide in favor of the party on whose side the weight of evidence preponderates and according to the reasonable probability of the truth.

If you find from the evidence that the plaintiff is entitled to a verdict, you must not, in ascertaining the amount, resort to the pooling plan or scheme which has sometimes been adopted by juries in fixing such amount, namely, that each one of you write or name the amount to which you consider the plaintiff entitled, add the amounts so written or named together and divide the total by twelve. This is a scheme of chance, and no element of chance must enter into your verdict or into the determination of any question necessary thereto.

If the evidence is contradictory, your decision must be in accordance with the preponderance thereof. It is your duty, however, if possible to reconcile such contradictions so as to make the evidence reveal the truth. When the evidence in your judgment is so equally balanced in weight and quality, effect and value, that the scales of proof hang even, your verdict should be against the party upon whom rests the burden of proof.

In determining the credibility of a witness, you may consider among other things whether his testimony is in itself contradictory; whether it has been contradicted by other credible witnesses; whether his statements are reasonable or unreasonable; whether they are consistent with each other or with the facts established by other evidence, or with admitted facts.

[fol. 130] You may also consider a witness' manner of testifying upon examination; the character of his testimony; the bias or prejudice, if any, manifested by him; his interest or absence of interest in the suit: his recollection, whether good or bad, clear or indistinct, concerning the facts to which he testifies; his inclination or motives, together with his opportunity of knowing of the facts whereof he speaks. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in this action.

The credibility of experts and the weight to be given to their testimony is within your power to deterimne, and while you may take into consideration their testimony and award to it such value as in your judgment it demands, you are not bound by their opinions. You are not bound to accept the judgment of such witness in place of your own. You may exercise your own knowledge and ideas.

By "ordinary care" is meant that degree of care which would be observed under given circumstances by the average man.

The proximate cause of an event must be understood to be that which, in the natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred.

The question is this case for you to determine is the question of negligence; and this question you are to resolve upon a consideration of all the facts and evidence in the case.

Negligence is the omission to so something which an ordinarily prudent person would have done under the circum-[fol. 131] stances; or the failure on the part of one to perform a duty owing to another; or the doing of something which such a person would not have done in the same situation. It is not absolute or intrinsic, but always relates to some circumstance of time, place or person.

Upon the plaintiff rests the burden of showing by a preponderance of the evidence that it was the negligence of the defendant which caused the injury. Unless plaintiff makes this proof, he cannot recover. A mere surmise that there may have been negligence on the part of the defendant, or the mere fact that an accident happened to the decedent does not entitle plaintiff to a verdict.

You are instructed that the burden is upon the plaintiff to prove the allegations of her complaint which are

denied by the defendant's answer. In this case it is admitted that at the time and place referred to in plaintiff's complaint, plaintiff's intestate was in the employ of the defendant as a bridge tender and was acting within the scope of his employment, and the deceased and defendant were engaged in interstate commerce, and therefore come within the provisions of the Federal Employees' Liability Act. The remaining allegations of plaintiff's complaint are denied by defendant and constitute therefore the issues of fact for you to determine in this case.

(Proposed by Plaintiff.)

If the injured employee was himself guilty of neglience contributing to the injury, the law applicable to this case expressly provides that it shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence, if any, attributable to such employee.

(Proposed by Plaintiff.)

[fol. 132] Any fact in this case may be proven either by direct or circumstantial evidence, or by both. Direct evidence is that which proves the fact in dispute directly, without an inference or presumption and which in itself, if true, conclusively establishes the fact. Circumstantial or indirect evidence is that which tends to establish the fact in dispute by proving another fact, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence.

(Proposed by Plaintiff.)

If you find that the plaintiff's intestate came to his death and his death resulted in whole or in part from the negligence of any of the officers, agents or employees of said defendant, or by reason of any defect or insufficiency due to defendant's negligence in its appliances, tracks, works or other equipment and which was not the result of risks or dangers assumed by said intestate, then your verdict must be for the plaintiff.

(Proposed by Plaintiff.)

If you find that the plaintiff's intestate came to his death and that his death was not the result of risks or dan-

gers assumed by him, but that said death was proximately caused by the negligence, if any, of the defendant, and the negligence, if any, of the deceased, then your verdict must be for the plaintiff.

(Proposed by Plaintiff.)

While an employee assumes the risks and dangers ordinarily incidental to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible, the employee has a right to as- [fol. 133] sume that the employer has exercised proper care with respect to providing a reasonably safe place to work, and the said employee is not to be treated as assuming a risk that is attributable to the employer's negligence, if any, until he becomes aware of it or it is so plainly observable that he must be presumed to have known of it.

(Proposed by Plaintiff.)

In order to bring in a verdict for the plaintiff in this action, you must find that the defendant was guilty of negligence, and that said negligence proximately caused the death of Perry E. Bobo.

(Proposed by Defendant.)

This action is not governed by the provisions of the California laws relative to the injury or death of an employee while in the course of his employment, but is governed by the provisions of the laws of the United States covering the injury or death of an employee engaged in Interstate Commerce, and under said laws negligence on the part of such employer must first be proved before the employer shall be liable in damages for the injury or — of an employee.

(Proposed by Defendant.)

In deciding this case you must not be influenced or swayed by feelings of sympathy for plaintiff. Sympathy is a commendable quality, but it has no place in the jury box.

(Proposed by Defendant.)

If you find that the death of Perry E. Bobo was caused by an accident, that is, without fault on the part of anybody, you must find a verdict for the defendant.

(Proposed by Defendant.)

[fol. 134] If you find from the evidence that the defendant Railroad Company, at the time and place of death of Perry E. Bobo, provided a reasonably safe place for him to work, and was guilty of no act of negligence contributing to or causing his death, your verdict must be for the defendant.

(Proposed by Defendant.)

Even though you find from the evidence that the death of Perry E. Bobo was caused by his slipping or falling from the bridge where he was employed, unless you find that his said slipping or falling was proximately caused by some negligent act or omission on the part of the defendant, you must find a verdict in favor of the defendant.

(Proposed by Defendant.)

The mere fact that Perry E. Bobo met his death while engaged in his employment on the bridge of defendant, does not, of itself, entitle his widow to recover damages.

(Proposed by Defendant.)

The law demands that one who is working in a place where he is exposed to danger shall himself exercise his faculties for his own protection, and does not permit a recovery for damages resulting solely from a neglect of his duty.

(Proposed by Deft.)

The mere fact that an accident happened does not raise any presumption of negligence in this case against the defendant. A presumption, whether of negligence or other condition, where permitted to be drawn by the law, has the force and effect of any evidentiary matter, that is, as far as it goes, proof in the case; but the present case, upon its own facts, is not one where, with reference to the mere happening of the accident, any presumption of negligence is raised against the defendant.

(Proposed by Defendant.)

[fol. 135] I instruct you that an employer is not an insurer of the safety of his employees, but is merely charged with the duty of exercising ordinary care to prevent injury to them.

(Proposed by Defendant.)

Where an employee has actual knowledge of the dangers involved in the work comprising the usual and ordinary duties of his employment, he must be held to have assumed such dangers or risks, and his representatives cannot recover in a case against his employer for death due solely to the said dangers or risks assumed by him.

(Proposed by Defendant.)

If you find from the evidence in this case that it was one of the usual and ordinary duties of Perry E. Bobo as a bridge tender employed by the defendant to ascend and descend the stairs leading to the engine room on the bridge in question, and that the risks, if any, in so doing was well known and understood by said Perry E. Bobo prior to February 3rd, 1930, and was plainly obvious to him, and that he had continued in his said employment knowing and appreciating said risk, I instruct you that the said risk was assumed by said Perry E. Bobo, and, under the law applicable to this action, plaintiff cannot recover herein and your verdict must be for the defendant.

(Proposed by Defendant.)

In these actions for damages, the court usually instructs the jury upon the rule or measure of damages; but the jury are not to understand that they are to give damages simply because instructions have been addressed to them on the subject. These instructions as to damages are intended to apply only in a case where the plaintiff is entitled to a verdict, but they have no application where, [fol. 136] upon the whole case, the liability of the defendant has not been established, nor should they be understood by the jury as conveying any intimation that, in the opinion of the court, plaintiff is or is not entitled to damages.

(Proposed by Defendant.)

If your verdict is for the plaintiff, and you find and believe from the evidence that the decedent Perry E. Bobo

came to his death by reason of the negligence of the defendant, and that he was at all times exercising ordinary care for his own safety, then you will fix the damages at such sum as you shall find and believe from the evidence will fairly and reasonable represent the present cash value of such pecuniary advantages and assistance as you shall find and believe from the evidence his wife, Josephine Bobo, would have received, if any, from said decedent during his lifetime had he lived, and such further sum as you shall find and believe from the evidence will fairly and reasonably represent the present cash value of such pecuniary advantages and assistance as you shall find and believe from the evidence the minor children, Elwood and Fabian Bobo, would have received from their father during their minority, had he lived such time; and in fixing such damages and arriving at the present cash value thereof, you may take into consideration the age, probable expectancy in life, health, physical conditions, habits, his mode of treatment toward his family and the amount he contributed out of his wages to them for support, and the earning power of the decedent, Perry E. Bobo, the age and probable expectancy of life of his wife, Josephine Bobo, and the age of his said minor children, Elwood and Fabian [fol. 137] Bobo, and such pecuniary assistance as you shall find and believe from the evidence he would have given his wife, Josephine Bobo, during his lifetime, had he lived, and the said children during their minority, had he lived; and you will take into consideration such reasonable rates of interest as you shall find and believe from the evidence that persons of the age and experience of said wife and children might reasonably be expected to derive from the investment of the money so awarded, if any, in reasonable safe investments; and your whole award cannot exceed the present cash value of the actual pecuniary loss, if any, sustained by said wife and children, and the entire award, if any, cannot exceed that amount demanded in said complaint, which is fifty thousand dollars.

(Proposed by Plaintiff.)

The measure of damages in this case is that fixed by the Employer's Liability Act for the benefit of certain persons, to-wit, in this case, the widow and minor children of the deceased, and is the loss in money caused by reason of

the death of the husband and father. It is purely and entirely a money or financial loss. How much money have the widow and minor children been deprived of by the death, computing the same at its present worth or value? It is not a question of how much the deceased could have earned for his own use had he lived out his allotted time, but the present value of the sum his widow and minor children during their minority might have reasonably expected to receive from his earnings during their lifetime, for the limit of time during which the widow could expect [fol. 138] to receive from her husband in the time which she could reasonably be expected to live. You will allow nothing for the suffering or sorrow of either the deceased or his widow or children. You must not attempt to punish the defendant, but endeavor to give a fair and reasonable sum which would, in your judgment, represent the fair value of what the widow and minor children had a reasonable right to expect, under all circumstances, to receive from said Perry E. Bobo had he lived.

(Proposed by Plaintiff.)

The pecuniary loss of the beneficiaries of an employee killed while engaged in interstate commerce is not what the deceased might have earned but what part of his earnings they might reasonably have expected to receive had he lived.

(Proposed by Plaintiff.)

When you retire to the jury room, you will elect one of your members foreman; when nine of your number have agreed upon a verdict, you will have your foreman sign the appropriate form and return it into court as the verdict of the jury. Have you the forms?

The Clerk: Yes, your Honor.

The Court: Swear an officer. (Officer sworn, and jury retires to jury room.)

(Recess.)

(At 4:27 P. M., the jury returns.)

The Court: It is stipulated that all jurors are present?

Mr. Palmer: Yes, your Honor.

Mr. Duke: Yes, stipulated.

[fol. 139] The Court: Have you agreed upon a verdict?

The Foreman: No, sir. Your Honor, the jury wishes to know—I don't know whether it is permissible or not, this question. They are interested in this point, that is to say, as far as the salary of the deceased is concerned, was anything else included along with that? For instance the argument was brought up——

The Court: (Intg.): Without stating what discussion you had you must be bound by the evidence here. Now the only evidence we have here, and the jury has heard, is that the salary was $90 a month, and there is no evidence that the decedent had any other income, therefore we must stand on the evidence that is here.

The Foreman: Yes, sir.

The Court: All right.

(Jury retired to jury room.)

[fol. 140] Reporter's certificate to foregoing transcript omitted in printing.

[fol. 141] Judge's Certificate

I hereby certify that the foregoing transcript is a full, true and fair transcript of the proceedings had at the trial of the said action, the testimony offered and taken, the evidence offered and received, instructions, the acts and statements of the Court and all objections and exceptions of counsel and the matters to which the same relate.

(Signed) Edward I. Butler, Judge.

Dated San Rafael, Oct. 27, 1931.

[fol. 142] [File endorsement omitted]

In District Court of Appeal, State of California, First Appellate District, Division One

No. 8209

Josephine Bono, as Administratrix of the Estate of Perry E. Bobo, Deceased, Plaintiff and Respondent,

vs.

Northwestern Pacific Railroad Company (a Corporation), Defendant and Appellant

Opinion by the Court Filed Jan. 27, 1933

An action by Josephine Bobo, as administratrix of the estate of Perry E. Bobo, deceased, to recover damages from defendant corporation on account of the death of decedent. At the time of his death decedent was employed by defendant as a bridge tender on a drawbridge operated by it over and across Petaluma creek in Marin county.

Plaintiff alleged that decedent in the performance of his duties slipped and fell from the steps leading to the top of the drawbridge and was precipitated into the waters of the [fol. 143] creek, causing his death; that defendant negligently failed to provide decedent with a safe place to work in that the steps were constructed and maintained in a manner which rendered them unsafe, namely, that it failed to install proper guard rails thereon and on the approaches thereto, and "permitted said steps to become uneven so that they sloped and permitted water to collect in depressions on said steps, on which said deceased slipped and fell."

Decedent had been employed as a bridge tender for about six months, his working hours being between 9 p. m. and 5 a. m. It is admitted that he was engaged in interstate commerce. He came to work as usual on the night of November 3, 1930, and his wife accompanied him to the bridge. She left at about 11 p. m., and decedent was not seen alive thereafter. It was his duty as bridge tender, when vessels signalled for the opening of the bridge, to go to the center thereof, ascend a stairway to a small room on the top of the structure, where the engine and controls used in oper-

ating the bridge were maintained. Upon reaching the control room it was his duty to set the signals so that trains would stop before reaching the bridge, and then open the bridge, which turns upon an axis. After the vessel had passed it was his duty to close the bridge, examine the rail connections at the ends thereof in order to ascertain if the same were properly aligned, and then to set the signals so that trains could proceed across the bridge. There was [fol. 144] kept in the control room a log book wherein was customarily entered the fact of the passage of vessels; and in this appeared an entry in decedent's handwriting to the effect that a steamer had passed through at 1:20 a.m. on February 4, 1930. On the night of his disappearance the weather was clear, but it was shown that in winter dew gathered on the stairway, making it slippery. Two weeks later decedent's body was found in the creek at a point about a mile from the bridge. The stairway contained 35 steps and pitched at an angle of 48½ degrees to the horizontal. It was on the outside of the bridge uprights and over the water. On each side of the stairway and on the platform at the foot there was a single hand rail 3 feet 1 inch above the steps and platform. Decedent was wearing a coat with a sheepskin collar and, according to the testimony, there was observed on the morning of February 4 along the outer edge of the platform hairs similar to wool, and a spot which had the appearance of blood. The testimony also shows that the body was bruised in several places, one appearing on the back of the head; further, that the metal steps were worn smooth, and that the same was true of the buttons inserted in the foot plates to prevent slipping. According to an engineer, who was shown to be familiar with safety devices used in different industries, the stairway was defective in that it is customary to provide a railing 42 inches in height, with either a mesh or a second rail, to prevent a falling body from passing under the upper rail, and also a toe board on the edge of the platform.

[fol. 145] A motion for a nonsuit was denied, and the jury having returned a verdict for the plaintiff, defendant has appealed from the judgment entered thereon.

As grounds therefor it is claimed that the evidence was insufficient to sustain a finding that defendant was negligent; that decedent assumed the risks incident to his em-

ployment, one of which was the condition of the stairway, and that the complaint failed to state a cause of action. As stated, plaintiff specifically alleged and now contends that decedent slipped from the stairway or platform and was drowned, the defects mentioned being the cause of his fall.

State laws on the subject of employers' liability to employees in interstate transportation were superseded by the Federal Employers' Liability Act (Second Employers' Liability Cases, 223 U. S. 1, 55; Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan, 271 U. S. 472), and the decisions of the federal Supreme Court control in determining the issue of negligence where the act governs (Smithson v. A., T. & S. F. Ry. Co., 174 Cal. 148; Hines v. Ind. Acct. Comm., 184 Cal. 1). Thereunder the defense of assumption of risk remains as at common law with the exception, as therein provided, of "any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee" (A., T. & S. F. Ry. Co. v. Swearingen, 239 U. S. 339; Southern Ry. Co. v. Crockett, 234 U. S. 725; Seaboard Air Line v. Horton, 233 U. S. 492); but this exception has [fol. 146] been held not to include state statutes. (See cases last cited.) The decisions of the federal Supreme Court also control the question whether there was an assumption of risk by an employee (Pryor v. Williams, 254 U. S. 43); and while this is an affirmative defense and must be pleaded (Thomas v. Southern Pacific Co., 116 Cal. App. 126), whereas here the question was presented for the jury's determination by an instruction proposed by plaintiff, any objection that the issue was not within the pleadings was waived (2 Cal. Jur., Appeal and Error, sec. 73, p. 246). The evidence in such cases must reasonably support the conclusion that the injury was proximately caused by the negligence of the employer (A., T. & S. F. Ry. Co. v. Toops, 281 U. S. 351); and whenever circumstantial evidence is relied upon to prove the fact the circumstances must be proved and not themselves presumed (Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan, supra).

In the following federal cases cited by defendant, where the cause of the injury was not directly shown, the court said that the evidence was such as to leave the question

of defendant's negligence in the realm of surmise and conjecture, and denied a recovery: Patton v. Texas & Pacific Ry. Co., 179 U. S. 658; Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan, supra; N. Y. Central R. R. Co. v. Antoyous, 280 U. S. 320. Nevertheless, as held by the same court, where there is uncertainty as to the existence of negligence, whether such uncertainty arises from a conflict of testi[fol. 147] mony, or, because, the facts being undisputed, fair minded men might honestly draw different conclusions therefrom, the question is one of fact for the jury: Richmond & Danville R. R. Co. v. Powers, 149 U. S. 43; Texas & P. R. Co. v. Harvey, 232 U. S. 300. To the same effect are the following California decisions: Mah Hop v. North American Accident Ins. Co., 190 Cal. 421; Hotaling v. Hotaling, 193 Cal. 368; Michener v. Hutton, 203 Cal. 604.

Here the evidence was reasonably sufficient to show that the condition of the stairway and platform rendered their use unsafe at night and the physical facts fairly support the conclusion that decedent fell therefrom and that his body passed under the railing into the water.

While it is the rule under the statute that an experienced employee who knows the material conditions must be considered as appreciating the danger and assuming the risk, although at the time he may have forgotten the existence of the danger and the employer was negligent in allowing the danger to remain (Jacobs v. Southern Ry. Co., 241 U. S. 229), here, so far as shown, decedent had never assended the stairway during the day time; nor was he aware of the conditions which made the structure dangerous. The complaint described the defects which were alleged to have caused the injury; and defendant contends that these allegations show that the cause of death was a risk assumed by decedent, and that consequently no cause of [fol. 148] action was stated, citing Brosette v. E. B. & A. L. Stone Co., 162 Cal. 74; but, as pointed out, the evidence was insufficient to show that decedent knew of the defects described, or that the conditions under which he was employed were such that he must have known them.

We are satisfied that the facts reasonably presented a case for the jury, and that its conclusions are fairly supported by the evidence.

The judgment is affirmed.

[Fol 149] In District Court of Appeal of California in and for the First Appellate District, Division One

[Title omitted]

Order Denying Petition for Rehearing Filed Feb. 28, 1923

By the Court:

The petition for a rehearing filed in the above entitled cause is hereby denied.

Dated this 28th day of February, 1923

Presiding Justice

[File endorsement omitted.]

[Fol 150] In Supreme Court of California, in Bank

L. No. 8200

Bono, Adina,

vs.

Northwestern Pac. R. R. Co.

Order Denying Petition for Rehearing Filed March 27, 1923

By the Court:

The appellant's petition to have the above entitled cause heard and determined by this Court after judgment in the District Court of Appeal of the First Appellate District, Division 1, is denied.

Dated this 27th day of March, 1923.

Waste, C. J.

[File endorsement omitted.]

Clerk's certificate to foregoing paper omitted in printing.

[fol. 151] In District Court of Appeal of California in and for the First Appellate District, Division One

San Francisco, January 27, 1933.

No. 8209

Josephine Bobo, as Administratrix of the Estate of Perry E. Bobo, Deceased, Plaintiff and Respondent,

vs.

Northwestern Pacific Railroad Company, a Corporation, Defendant and Appellant

On Appeal from the Superior Court in and for the County of Marin

Judgment Jan. 27, 1933

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the Court herein is delivered by the Court.

Whereupon it is ordered, adjudged and decreed by the Court that the Judgment of the Superior Court in and for the County of Marin in the above entitled cause be, and the same is hereby, affirmed. The respondent to recover costs of appeal.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 152] [File endorsement omitted]

[fol. 153] In District Court of Appeal of California in and for the First Appellate District, Division One

No. 8209

[Title omitted]

Stipulation as to Transcript of Record—Filed April 28, 1933

Whereas, the Petitioner above named is about to apply for a writ of certiorari to the Supreme Court of the United

States to review the decision of the District Court of Appeal of the State of California, First Appellate District, Division One, heretofore rendered in the above entitled cause.

Now, therefore, it is hereby stipulated and agreed by and between counsel for the respective parties that the following shall be deemed to constitute the record in said cause to be filed with Petitioner's said petition for a writ of certiorari, and shall be certified by the Clerk of this [fol. 154] Court as constituting such record:

1. The Clerk's Transcript on appeal to the District Court of Appeal of the State of California, First Appellate District, Division One;

2. Reporter's transcript on appeal to the District Court of Appeal of the State of California, First Appellate District, Division One;

3. The opinion and judgment of the above entitled Court filed January 27, 1933;

4. The Order denying the petition for rehearing entered herein on February 25, 1933;

5. The Order denying the petition for hearing by the Supreme Court of the State of California filed March 27, 1933;

6. The Remittitur of the District Court of Appeal of the State of California, First Appellate District, Division One, to the Superior Court of the State of California in and for the County of Marin;

7. This Stipulation; and

8. Any order of the Court made pursuant to this Stipulation.

It is further stipulated and agreed by and between counsel for the respective parties that the following are unnecessary and need not be printed as part of the record before the Supreme Court of the United States:

1. Stipulation for bringing exhibits from the Superior Court of the State of California, in and for the County of Marin, and for use of the same on hearing by the District Court of Appeal of the State of California in and for the First Appellate District, Division one;

[fol. 155] 2. The petition for re-hearing in said District Court of Appeal filed February 10, 1933;

3. The Respondent's reply to petition for a re-hearing in said District Court of Appeal filed February 24, 1933;

4. The Petition for a hearing by the Supreme Court of the State of California filed March 3, 1933;

5. Respondent's reply to petition for a hearing by said Supreme Court filed March 16, 1933;

6. The petition for an order staying the execution and enforcement of the judgment of the Superior Court of the State of California, in and for the County of Marin filed April 1, 1933 to enable petitioner to apply for and obtain a writ of certiorari in the Supreme Court of the United States;

7. The order for stay of execution filed April 1, 1933 to enable petitioner to apply for and obtain a writ of certiorari in the Supreme Court of the United States; and

8. The bond on stay of execution approved and filed April 1, 1933.

It is further stipulated and agreed by and between counsel for the respective parties that the original exhibits on file in the Superior Court of the State of California, in and for the County of Marin, may be withdrawn and sent to the Clerk of the District Court of Appeal of the State [fol. 156] of California, First Appellate District, Division One, for inclusion in the Reporter's Transcript and as part of the record to be certified to the Supreme Court of the United States.

Dated April 25th, 1933.

W. H. Orrick, R. W. Palmer, Orrick, Palmer and Dahlquist, Attorneys for Petitioner. Robert D. Duke, Laurence A. Cowen, Attorneys for Respondent.

(Here follow Plaintiff's Exhibits 1 to 3, side folios 156a, b, c, d, e, f, g, h, i, j, k)

[fol. 157] Clerk's certificate to foregoing transcript omitted in printing.

PLAINTIFF'S EXHIBIT NO. 1

156-A

PLAINTIFF'S EXHIBIT NO. 2A

1818

156-B

PLAINTIFF'S EXHIBIT NO. 2E

1180
156-0

PLAINTIFF'S EXHIBIT NO. 2B

1180

156-D

PLAINTIFF'S EXHIBIT NO. 2C

156-E

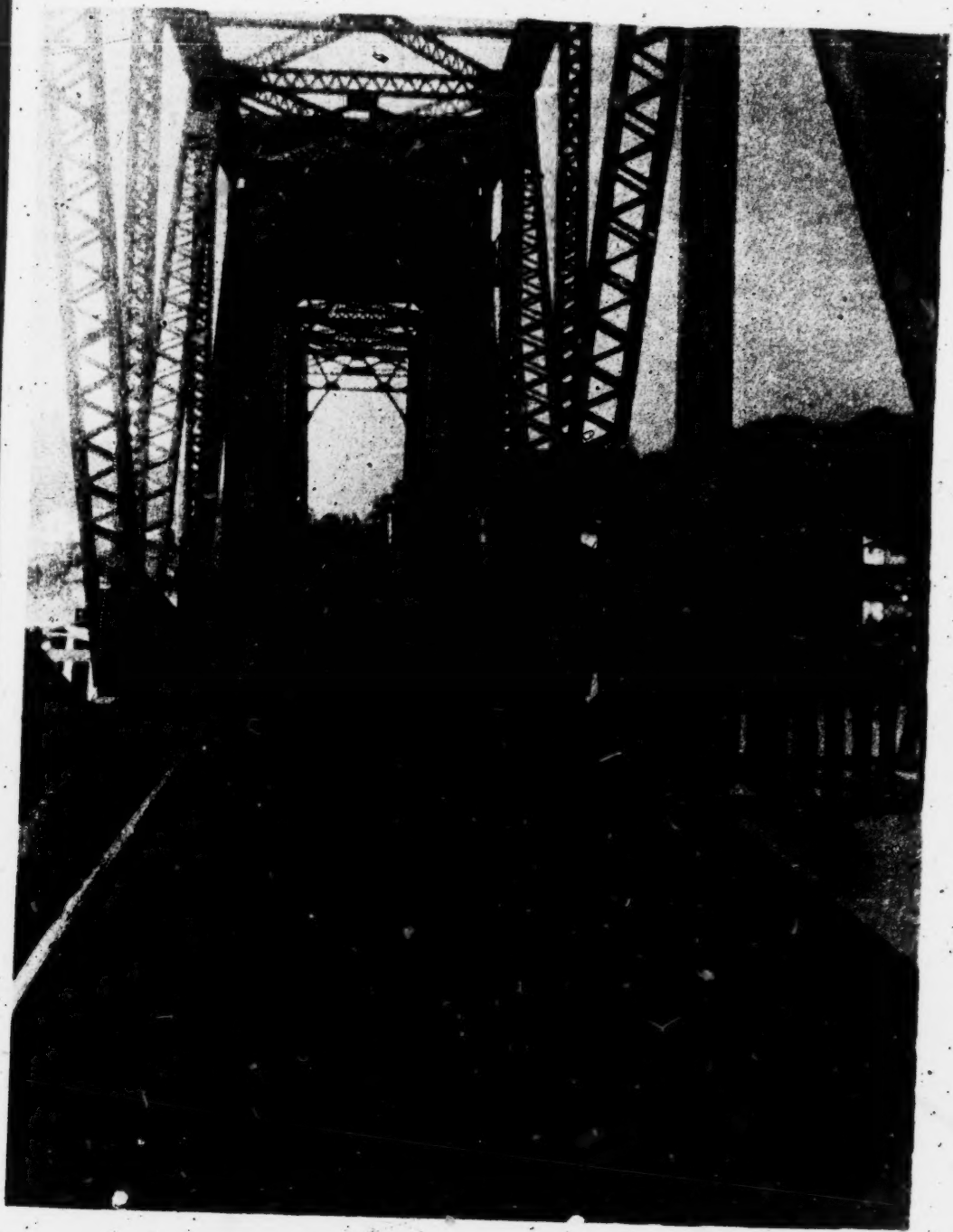
PLAINTIFF'S EXHIBIT NO. 2D

118F
156-F

118G

156-G

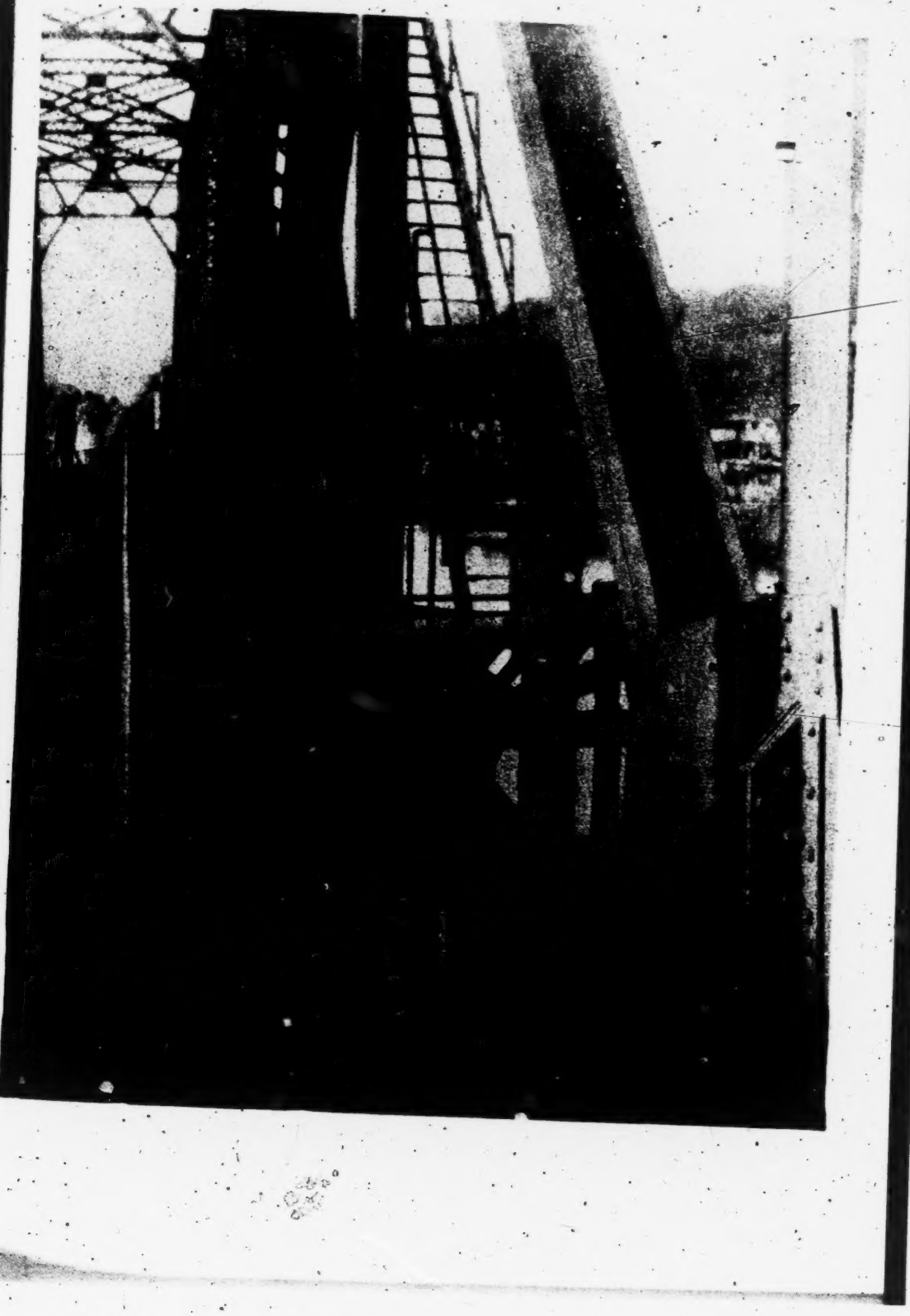
PLAINTIFF'S EXHIBIT NO. 1A



1181

EXHIBIT NO. 81 ON TRIAL OF DEFENDANTS

PLAINTIFF'S EXHIBIT NO. 1C



118K
156-K

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1933

The petition herein for a writ of certiorari to the District Court of Appeal, First Appellate District, State of California is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX.

Subject Index

	Page
Nature of case and questions involved	2
Reasons relied upon for allowance of a writ of certiorari	3
Brief	6
Prayer	6

Index to Cases.

Atchison, Topeka & Santa Fe Railway Company v. Saxon, 284 U. S. 458, 52 Sup. Ct. 229, 76 L. Ed. 397	4
Atchison, Topeka & Santa Fe Railway Company v. Toops, 281 U. S. 351, 74 L. Ed. 896, 50 Sup. Ct. 281	4
Chicago, Milwaukee & St. Paul R. Co. v. Coogan, 271 U. S. 472, 70 L. Ed. 1041, 46 Sup. Ct. 564	4
New York Central R. R. Co. v. Ambrose, 280 U. S. 486, 74 L. Ed. 562, 50 Sup. Ct. 198	4
Seaboard Air Line Railway v. Horton, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635	6
St. Louis San Francisco Railway Co. v. Mills, 271 U. S. 344, 70 L. Ed. 979, 46 Sup. Ct. 520	4

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 163

NORTHWESTERN PACIFIC RAILROAD COMPANY, A CORPORATION, PETITIONER,

vs.

JOSEPHINE BOHO, AS ADMINISTRATRIX OF THE ESTATE OF PERRY E. BOHO, DECEASED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The Northwestern Pacific Railroad Company respectfully petitions this Honorable Court for a writ of certiorari to the District Court of Appeal of the

If

State of California, First Appellate District, Division One, to review a judgment of the court pronounced on January 27, 1933, reported in 19 Pac. (2d) 10 (R. 111). The said court by its judgment affirms a judgment of the lower court for damages in favor of respondent and against petitioner. Within the time specified by Rule XXX of the Supreme Court of the State of California (213 Cal. lvii), petitioner made application for a rehearing which was denied by said District Court of Appeal on the 25th day of February, 1933, and thereafter and within the time specified by said Rule XXX petitioner made application for hearing by the Supreme Court of the State of California, which was denied on the 27th day of March, 1933.

Nature of Case and Questions Involved.

This is an action brought by respondent to recover damages for the death of her husband which occurred while he was employed by petitioner in interstate commerce. The action is brought pursuant to the provisions of the statute of the United States commonly known as the Federal Employers' Liability Act. Two questions are presented:

> First. Is it not incumbent upon one claiming damages under the Federal Employers' Liability Act to establish negligence and causal connection between this and the injury?
>
> Second. Does not an employee engaged in interstate commerce assume the risk of the use of appliances, even though the same are defective, if such defective condition and the risk

incident to their use are so obvious that an ordinarily prudent person under the circumstances must have observed and appreciated them?

The Reasons Relied Upon for Allowance of a Writ of Certiorari.

Decedent was employed as a bridge tender on the railroad bridge of petitioner Northwestern Pacific Railroad Company, which bridge crosses a navigable waterway known as Petaluma Slough. His hours of employment were from 9:00 p. m. to 5:00 a. m. He came to work as usual at 9:00 p. m. on the night of February 3, 1930, and was never seen alive thereafter. Two weeks later his body was discovered in the water some miles from the bridge. There were no eye-witnesses to the accident. Respondent charged negligence by petitioner in the maintenance of a certain steel stairway running from the main deck of the bridge up to the control house in the upper portion of the span (paragraph V of complaint, R. 2), the specific charges of negligence, as shown by the testimony of respondent's witnesses (R. 31, 32, 76, 77, 79), being (1) that the steps and platform at the bottom thereof were worn smooth and were slippery when wet; (2) that a single handrail only was maintained on each side of the stairway and platform which left sufficient space so that a person falling or slipping on the stairs could slide under the handrail and into the water.

The evidence showed (R. 28, 29, 52, 63-64) that certain hairs similar to those on the sheepskin collar of a coat

worn by the decedent and a spot resembling blood were found at the edge of the platform at the bottom of the stairs. One witness also testified that there was a bruise on the back of decedent's head when the body was recovered (R. 30). This evidence it is claimed was sufficient to show that the decedent fell off the bridge at that point. *No evidence whatsoever* was introduced showing or tending to show what caused decedent to fall or that his fall was caused by any negligence on the part of his employer, if, indeed, it can be said that he did fall.

This Court has repeatedly held that one who claims under the Federal Employers' Liability Act must in some adequate way establish negligence and causal connection between this and the injury and that judgments for damages under this act may not be based upon speculation.

Atchison, Topeka & Santa Fe Railway Company v. *Saxon*, 284 U. S. 458, 52 Sup. Ct. 229, 76 L. Ed. 397;

Chicago, Milwaukee & St. Paul R. Co. v. *Coogan*, 271 U. S. 472, 70 L. Ed. 1041; 46 Sup. Ct. 564;

Atchison, Topeka & Santa Fe Railway Company v. *Toops*, 281 U. S. 351, 74 L. Ed. 896, 50 Sup. Ct. 281;

New York Central R. R. Co. v. *Ambrose*, 280 U. S. 486, 74 L. Ed. 562, 50 Sup. Ct. 198;

St. Louis-San Francisco Railway Co. v. *Mills*, 271 U. S. 344, 70 L. Ed. 979, 46 Sup. Ct. 520.

The only evidence concerning the decedent's activities on the night he disappeared was testimony that

he came to work on the bridge at 9:00 p. m. that evening, and that there was an entry in his handwriting in the log book on the bridge showing that a steamer passed through at 1:20 a. m. (R. 55). His body was not found until two weeks afterwards. What caused him to fall or jump off the bridge is unknown. It is the theory of respondent that his foot slipped on this stairs or platform and he fell off the platform at the foot of the stairway under the railing. No one can say that his fall was caused by the slippery condition of the platform or stairs or that he was precipitated into the water by reason of the absence of a lower railing, and to make such an assertion is to indulge in pure conjecture, which is what the jury was permitted to do here. It might be said with equal force that he was attacked with a fainting spell or became dizzy or fell due to some act of his own not connected with the slippery condition of the stairs. The theory of respondent and the verdict of the jury are based solely on guesswork.

The decision of the District Court of Appeal of the State of California on this point is not in accord with the decisions of this Court in the aforementioned cases. We most respectfully assert that this petition should be granted in order that there be uniformity of decision under this Federal statute. It is submitted that to permit the California decision to stand would cause confusion and uncertainty in future actions in California under this statute.

The decision of the District Court of Appeal of the State of California is also not in accord with the applicable decisions of this Court on the question of

assumption of risk. As hereinbefore set forth, it is the claim of respondent that the negligence of petitioner consisted in maintaining a stairway and platform which were slippery when wet and in not providing more than a single handrail around the same. Although it is true that the decedent only worked at night, it is further admitted that in the course of his duties for a period of more than six months before his death he was compelled to ascend and descend this stairway several times each night when the steps were slippery (R. 44-45, 47), and that in order to perform his duties as bridge tender it was necessary for him to carry a lantern or flashlight with him (R. 60). Clearly the claimed defects, to wit, the slippery surface of the stairway and the absence of secondary railings, were plainly apparent to the decedent, and the risks incident to their use were such as could have been comprehended by a person of the most limited intelligence. Under similar circumstances, this Court has held that the employee assumes the risk of the use of such appliances.

Seaboard Air Line Railway v. *Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635.

Brief.

A brief in support of this petition is filed herewith.

Prayer.

Wherefore, your petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the District Court of Appeal of the State of California, First Appellate District, Divi-

sion One, commanding said court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and all proceedings in the case numbered and entitled in said Court: "No. 8209, Josephine Bobo, as Administratrix of the Estate of Perry E. Bobo, deceased, plaintiff and respondent, v. Northwestern Pacific Railroad Company (a corporation), defendant and appellant", to the end that said case may be reviewed and determined by this Court as provided by law, and that said judgment of said District Court of Appeal of the State of California may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just.

Dated: San Francisco, May 11, 1933.

W. H. ORRICK,
R. W. PALMER,
Attorneys for Petitioner.

INDEX.

Subject Index to Brief.

	Page
The decision of the California court is not in accord with the applicable decisions of this Court in that no causal connection was established in this case between the alleged negligence of petitioner and the death of decedent	1
The decision of the California court on the question of assumption of risk is contrary to the rule laid down by this Court with respect to such defense under the Federal Employers' Liability Act	11

Index to Cases.

Atchison, Topeka & Santa Fe Railway Company v. Saxon, 284 U. S. 458, 52 Sup. Ct. 229, 76 L. Ed. 397	4
Atchison, Topeka & Santa Fe Railway Company v. Toops, 281 U. S. 351, 74 L. Ed. 896, 50 Sup. Ct. 281	10
Chicago, Milwaukee & St. Paul R. Co. v. Coogan, 271 U. S. 472, 70 L. Ed. 1041, 46 Sup. Ct. 564	2, 4, 6
Seaboard Air Line Railway v. Horton, 233 U. S. 492, 58 L. Ed. 1062, 34 Sup. Ct. 635	11

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 163

NORTHWESTERN PACIFIC RAILROAD COMPANY, A CORPORATION, PETITIONER,

vs.

JOSEPHINE BOBO, AS ADMINISTRATRIX OF THE ESTATE OF PERRY E. BOBO, DECEASED, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The decision of the California court is not in accord with the applicable decisions of this Court in that no causal connection was established in this case between the alleged negligence of petitioner and the death of decedent.

Under the decision of the District Court of Appeal of the State of California, respondent is permitted to recover damages under the Federal Employers' Liability Act without establishing negligence and causal

connection between the negligence and the death of decedent.

In *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Coogan*, 271 U. S. 472, 46 Sup. Ct. 564, 70 L. Ed. 1041, this Court, speaking through Mr. Justice Butler, says, at page 1043:

> "By the Federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail; and all State laws upon that subject were superseded. Second Employers' Liability Cases (*Mondou* v. *New York, N. H. & H. R. Co.*) 223 U. S. 1, 55, 56 L. Ed. 327, 348, 38 L. R. A. (N. S.) 44, 32 Sup. Ct. Rep. 167, 1 N. C. C. A. 875; *Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492, 501, 58 L. Ed. 1062, 1068, L. R. A. 1915C, 1, 34 Sup. Ct. Rep. 635, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834. The rights and obligations of the petitioner depend upon that act and applicable principles of common law as interpreted by the Federal courts. *The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act; and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish is not subject to the control of the several States. This Court will examine the record, and if it is found that as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed. St. Louis, I. M. & S. R. Co.* v. *McWhirter*, 229 U. S. 265, 277, 57 L. Ed. 1179, 1186, 33 Sup. Ct. Rep. 858; *New Orleans & N. E. R. Co.* v. *Harris*, 247 U. S. 367, 371, 62 L. Ed.

1167, 1170, 38 Sup. Ct. Rep. 535; *New Orleans & N. E. R. Co.* v. *Scarlet*, 249 U. S. 528, 63 L. Ed. 752, 39 Sup. Ct. Rep. 369." (Italics ours.)

The record in this case is short and the evidence without conflict. The testimony upon which respondent relies in support of the allegations of negligence merely proved that the surface of the steps and platform of the steel staircase had been worn smooth and that the tops of the small iron knobs thereon had also been worn somewhat and were also smooth; that as a result of this smoothness the stairs and platform when wet were slippery (R. 31, 32, 76, 77, 79). It was further established that nearly every night in the winter time the stairs were wet with dew (R. 46), although there is no proof that the stairs were wet on the night decedent was last seen upon the bridge (R. 45). It was further charged that in other industries it was considered proper for stairways of this character to have double rails or even a toe board along the sides of the steps or platform (R. 78 79). No one can say at what time or in what manner decedent fell or jumped from the bridge. It is left to conjecture whether he was seized with a dizzy spell or tripped or was caused to fall by some act of his own not connected with the slippery condition of the steps.

This Court has repeatedly granted petitions for certiorari after decision by State courts on this identical question and has adhered to the rule that the evidence must, in some adequate way, establish the negligence and causal connection between this and the injury.

The identical situation is presented here as that passed upon by this Court in *Atchison, Topeka & Santa Fe Railway Co.* v. *Saxon*, 284 U. S. 458, 52 Sup. Ct. 229, 76 L. Ed. 397, and *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Coogan* (*supra*). In the former, the Court speaking through Mr. Justice McReynolds, in 76 L. Ed. at page 398, says:

> "While employed as head brakeman by petitioner Railway Company and engaged in interstate commerce, J. W. Moore sustained fatal injuries at a New Mexico station. His personal representative obtained a judgment for damages, under the Federal Employers' Liability Act, in a Texas court.
>
> "The court of Civil Appeals at El Paso reversed this, holding that the evidence failed to show the accident resulted from the carrier's negligence. The Supreme Court granted a writ of error, reversed the Court of Civil Appeals and affirmed the original judgment. It concluded that, viewing all the evidence, there was enough to show negligence and causal connection between this and the death.
>
> "The matter is here by certiorari. The Railway sets up a claim under the federal statute which it has not heretofore had opportunity to submit for adjudication to any federal tribunal. The cause is one of a peculiar class where we have frequently been obliged to give special consideration to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the Liability Act as here interpreted.
>
> "Examination of the record convinces us that the Court of Civil Appeals reached the proper conclusion. We can find no evidence

from which it may be properly concluded that Moore's tragic death was the result of negligence by the Railway Company. As often pointed out, one who claims under the Federal Act must in some adequate way establish negligence and causal connection between this and the injury. *New York, C. R. Co.* v. *Ambrose*, 280 U. S. 486, 74 L. Ed. 562, 50 S. Ct. 198; *Atchison, T. & S. F. R. Co.* v. *Toops*, 281 U. S. 354, 74 L. Ed. 899, 50 S. Ct. 284.

"In the language of the Supreme Court the respondent 'recovered in the trial court on the theory that the deceased, while in the discharge of his duties as a brakeman, was running along by the side of the track of the Railway Company and while doing so with the purpose and intent of boarding one of the cars in the train, he stepped on or upon some soft area or hole in his pathway, and was thereby caused to fall and be run over and killed' (Tex.) 36 S. W. (2d) 230.

"Nobody saw the accident; no one can say with fair certainty how it occurred. Consistently with the facts disclosed, it might have happened in one of several ways and without causal negligence by the petitioner. When last seen the deceased was running westwardly by the side of the train then moving in that direction. Across the pathway commonly used by trainmen, there was a slight depression—estimated to be four or five, or possibly six or eight, feet long and three feet wide—filled with small rock screenings. It was softer than other portions of the way—yielded to the foot. Eight or ten feet west of this witnesses found blood upon the rail.

"Two hours after the accident a fourteen year old boy discovered the mark of a shoe in the screenings. He said it 'was deeper than the footprint that I made, it looked as though somebody that was heavy or running had stepped in it. The front part of the foot was deepest.' There is no evidence nothing but conjecture to show that the deceased made this impression; and, even if he did, we cannot assume that by stepping there he was made to stumble and fall under the moving train.

"What occasioned this distressing accident can only be surmised. It was necessary to show causal negligence in order to establish the respondent's right to recover. The evidence fails to meet this requirement.

"The judgment below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

In *Chicago, Milwaukee & St. Paul Railroad Co.* v. *Coogan* (*supra*), the evidence showed that there was a bent or loosened pipe alongside of the defendant's railroad tracks at a point where the decedent was required to go to uncouple some cars. In some way while uncoupling the cars the decedent fell under the wheels and was killed. It was the contention of the plaintiff that the decedent slipped or tripped over the bent pipe and fell under the wheels. It was claimed that the defendant was negligent in so maintaining such a pipe alongside its tracks and that such negligence proximately caused the death of decedent. To support this contention a mark on the outside of decedent's shoes was displayed for the purpose of at-

tempting to show that he slipped upon the pipe. This Court, at page 566, says:

> "The case was tried, and respondent supports the judgment, on the theory that, when the switch engine stopped after the last coupling, deceased went between the caboose and car to couple the air hose; that he stepped between the rails with his right foot, leaving his left foot outside the south rail and between it and the pipe line; that, stooping to reach the air hose his left foot slipped backward under the bent pipe; that, before he had time to make the coupling, the cars were started backward in the movement to clear the switch; that, when he attempted to straighten up, his left foot was caught under the pipe, and he was forced backward, run over, and killed. It follows that, unless the evidence is sufficient to warrant a finding that the death resulted from the catching of deceased's left foot under the bent part of the pipe line the judgment cannot be sustained. As there is no direct evidence, it is necessary to determine whether the circumstances are sufficient to warrant a finding of that fact. *Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved and not themselves presumed. United States* v. *Ross*, 92 U. S. 281, 284, 23 L. Ed. 707; *Manning* v. *Insurance Co.*, 100 U. S. 693, 698, 25 L. Ed. 761. Assuming it was the duty of deceased to couple the air hose, it was necessary for him to go between the cars to do so. He was standing by the caboose when the first cut came in. The air hose coupling might have been made then or at any time after that. It was not made, and it is left to be inferred

that he postponed effort in that direction until after all the switching had been done and until the engine had hold of the string of cars. And then it must be inferred that he went between the cars in the manner claimed—his right foot between the rails, leaving his left foot outside, where, it is argued, it was caught under the bent pipe.

"The 'rounding depression' on the counter of the shoe is not sufficient to bridge the hiatus in the evidence. It is not shown when or how that depression was made. The condition of the shoe before the accident is not disclosed. A number of days elapsed before it was noticed, and it is not shown that in the meantime care was taken to keep it in the same condition or that the depression was not made after the accident. Even if the appearance of the shoe and other circumstances are sufficient to justify an inference that the depression might have been made by the bent pipe, it cannot be said that they constitute any reasonable support for a finding that it was so made. And, assuming that the depression on the shoe counter was made by contact with the bent pipe, there is nothing to indicate whether it was made at the time deceased was knocked down, or later while he was being dragged. But there is nothing to show that the pipe had any connection with the accident. * * *

"When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The

record leaves the matter in the realm of speculation and conjecture."

In each of the foregoing cases there were no eye-witnesses to the accident and what actually caused the decedent to fall was unknown. There was the testimony relative to the footprint in the soft ground in the Saxon case and the mark on the shoe of the decedent in the Coogan case and it was claimed that this evidence was sufficient to show that the decedent in the Saxon case was caused to fall under the cars by reason of the soft ground, and in the Coogan case by reason of the bent pipe alongside the tracks. In the case at bar there is only the testimony relative to the sheep hairs, alleged blood spot and bruise on decedent's head and the single handrail to support the claim that he was caused to fall into the water by the slippery condition of the stairs and the absence of a lower railing. We see no distinction between these three cases. In each case it might be surmised that the decedent was caused to fall by the alleged negligent act of his employer, but this Court has repeatedly held that a judgment under this act cannot be supported solely by surmise and speculation.

The California District Court of Appeal has said in its decision (R. 114) that the evidence was reasonably sufficient to show that the condition of the stairway and platform rendered their use unsafe at night and that the physical facts fairly supported the conclusion that decedent fell therefrom and his body passed under the railing into the water. In so holding, the decision of the California court does not meet the

requirements laid down by this Court in such an action. Not only was it incumbent on respondent to prove that the steps were unsafe, due to their slippery condition and single rail, but it was necessary to prove that the fall and death of decedent were proximately *caused* thereby.

In *Atchison, Topeka & Santa Fe Railway Co.* v. *Toops,* 281 U. S. 351, 50 Sup. Ct. 281, 74 L. Ed. 896, Mr. Justice Stone, at page 899, says:

> "But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer. *Patton* v. *Texas & P. R. Co.*, 179 U. S. 658, 45 L. Ed. 361, 21 Sup. Ct. Rep. 275; *New Orleans & N. E. R. Co.* v. *Harris,* 247 U. S. 367, 371, 62 L. Ed. 1167, 1170, 38 Sup. Ct. Rep. 535; *St. Louis-San Francisco R. Co.* v. *Mills,* 271 U. S. 344, 347, 70 L. Ed. 979, 983, 46 Sup. Ct. Rep. 520; *Chicago, M. & St. P. R. Co.* v. *Coogan,* 271 U. S. 472, 70 L. Ed. 1041, 46 Sup. Ct. Rep. 564; *New York C. R. Co.* v. *Ambrose,* decided February 24, 1930 (280 U. S. 486, *ante,* 562, 50 Sup. Ct. Rep. 198).
>
> "Even though we assume that in all the respects alleged the petitioner was negligent, the record does not disclose any facts tending to show that the negligence was the cause of the injury and death."

The decision of the Californa court on the question of assumption of risk is contrary to the rule laid down by this Court with respect to such defense under the Federal Employers' Liability Act.

In *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, at 1070, the United States Supreme Court says:

> "On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, *unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.*"

The evidence shows that although decedent was only employed at night he had been working on the bridge

continuously for six months before the accident; that his duties there were to open and close the bridge to permit boats to pass through; that in order to permit a boat to pass through it was necessary for him to traverse this stairway four times (R. 43-45). The testimony shows that when a boat whistled to go through the bridge the operator had to go up the stairs to the engine house on the top of the bridge and throw the semaphores and open the bridge. He then had to go down the stairs and go to each end of the draw and see that the rails were in proper alignment. He then had to return up the stairs to the engine room, throw the semaphores to permit the trains to cross the bridge and then descend the stairs to reach the little house where he customarily remained. The testimony further showed that it was necessary for the operator to have either a lantern or a flashlight to accomplish this work, and that lanterns in good condition were furnished by the company for this purpose (R. 60-61). Clearly, therefore, the decedent had gone up and down this stairway hundreds of times before the night of the accident, during all of which time he carried a lantern or a flashlight. The stairs were somewhat steep and it was customary to hold on to the railing in going up or down them. How can it possibly be said that any person of the most limited intelligence would not have observed and known that there was only one railing on the stairs and platform. The decedent was a man of ordinary intelligence. The ordinary knowledge and experience in human affairs tells us without any question that he could not have traversed this stairway hundreds of times in the course of his duty

without being aware of its physical characteristics. The same is true of the alleged slippery condition of the stairs. The testimony discloses that the stairs were slippery when wet. There is no evidence, however, that the stairs were wet at the time Bobo fell off the bridge. The testimony further discloses that nearly every night during the winter dew collected on the stairs rendering them slippery (R. 47). No one certainly could have been more aware of this condition than the decedent. His hours of duty were from 9:00 p. m. to 5:00 a. m. and he was in a better position to observe the wetness of the steps than any one else. Having gone up and down these stairs hundreds of times at night with a lantern and with his hand on the rail and with his feet on the alleged wet and slippery steps, it is to do violence to sound judgment or ordinary human experience to say that he was not aware of the fact that the stairs when wet were slippery and the danger incident thereto.

The California court in passing on this question in its decision (R. 114) merely says:

> "While it is the rule under the statute that an experienced employee who knows the material conditions must be considered as appreciating the danger and assuming the risk, although at the time he may have forgotten the existence of the danger and the employer was negligent in allowing the danger to remain (*Jacobs* v. *Southern Ry. Co.*, 241 U. S. 229), here, so far as shown, decedent had never ascended the stairway during the day time, nor was he aware of the conditions which made the structure dangerous."

The court wholly ignores the rule that where the conditions and the risk are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them, the employee is deemed to assume the same.

Respectfully submitted,

W. H. ORRICK,
R. W. PALMER,
Attorneys for Petitioner.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No. 163

NORTHWESTERN PACIFIC RAILROAD COMPANY (a corporation),

Petitioner,

vs.

JOSEPHINE BOBO, as Administratrix of the Estate of Perry E. Bobo, Deceased,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Subject Index

		Page
1.	The question of the sufficiency of the evidence is properly raised under the California rules of practice.....	1
2.	The record is complete.....	3

Table of Authorities Cited

	Page
California Code of Civil Procedure, Section 629.....	3
California Code of Civil Procedure, Section 956.....	2
Carter v. Canty, 181 Cal. 749, 186 Pac. 346, at page 753	2
Cortelyou v. Imperial Land Co., 166 Cal. 14, 134 Pac. 981	3
Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458.....	3
First National Bank of Monrovia v. Maryland Casualty Company, 162 Cal. 61, 121 Pac. 321.....	2
Rauer's Law & Collection Co. v. Templar Motors Co., et al., 69 Cal. App. 782, 232 Pac. 464.....	3
Smith v. Lightston, 182 Cal. 41, 186 Pac. 769.....	3

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

(1) The question of the sufficiency of the evidence is properly raised under California rules of practice. All proceedings prior to the petition for writ of certiorari to this court were conducted in the state and not in the federal court. The state rules of practice are, therefore, the only ones applicable.

The rule of the federal courts referred to in respondent's brief (pp. 6, 7) that the right to attack

a judgment on the ground that the evidence is insufficient, is lost by failure of the petitioner to request a peremptory instruction, has never been adopted or followed in California. The sufficiency of the evidence to support a verdict may be reviewed on appeal in the absence of a motion for nonsuit, directed verdict or new trial. Section 956 of the *California Code of Civil Procedure* provides as follows:

> "Upon an appeal from a judgment, the court may review the verdict or decision, and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment, or which substantially affects the rights of a party. The court may also on such appeal review any order on motion for a new trial. The provisions of this section do not authorize the court to review any decision or order from which an appeal might have been taken."

First National Bank of Monrovia v. Maryland Casualty Company, 162 Cal. 61, 121 Pac. 321, held, to quote from the syllabus:

> "A failure to object to evidence, or to move for a nonsuit, or to request specific findings, does not preclude an appellant from attacking a finding on the ground of insufficiency of the evidence to sustain it."

Carter v. Canty, 181 Cal. 749, 186 Pac. 346, at page 753:

> "An error in denying a motion for a nonsuit is not waived by a defendant solely by reason of the fact that after such denial he introduces evidence in defense."

See also:

Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458;
Smith v. Lightston, 182 Cal. 41; 186 Pac. 769;
Cortelyou v. Imperial Land Co., 166 Cal. 14; 134 Pac. 981;
Rauer's Law & Collection Co. v. Templar Motors Co. et al., 69 Cal. App. 782; 232 Pac. 464.

Section 629 of the California Code of Civil Procedure, relied on by the respondent (Br. p. 7), was added by the Legislature in 1923 (Stats. 1923, p. 750) and does not affect the above referred to rule.

(2) The record is complete. Respondent (Br. p. 13) complains that the record is incomplete. The exhibits (R. 118A to 118K) attached to the printed record, were made from the original exhibits. These original exhibits were incorporated in and filed with the original transcript of record with the Clerk of the Supreme Court of the United States pursuant to stipulation (R. p. 118).

Therefore, it is respectfully submitted that the petition for writ of certiorari should be granted.

Dated, San Francisco, California,
August 7, 1933.

W. H. ORRICK,
R. W. PALMER,
Attorneys for Petitioner.

Due service and receipt of a copy of the within is hereby admitted

this_____day of August, 1933.

_____

_____

Attorneys for Respondent.

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BRIEF FOR PETITIONER.

On Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District, Division One.

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Subject Index

	Page
Statement of the case	1
Specification of errors	4
No causal connection has been established in this case between the alleged negligence of the appellant and the death of decedent	5
Decedent assumed the risks incident to his employment on the bridge, including the use of the stairway in its then condition	12

Table of Authorities Cited

	Pages
Atchison, Topeka & Santa Fe Railway Co. v. Saxon, 284 U. S. 458, 52 Sup. Ct. 229, 76 L. Ed. 397	5, 6, 11
Atchison, Topeka & Santa Fe Railway Co. v. Toops, 281 U. S. 351, 50 Sup. Ct. 281, 74 L. Ed. 896	11
Baltimore etc. Railroad Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624	19
Biederman v. Montezuma Mfg. Co. (Ga.), 116 S. E. 225	16
Butler v. Frazee, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. Ed. 281	15
C. B. & Q. R. Co. v. Shalstrom, 195 Fed. 725	18
Chicago, Milwaukee & St. Paul R. R. Co. v. Coogan, 271 U. S. 472, 46 Sup. Ct. 564, 70 L. Ed. 1041	6, 8, 11
Marsh v. Chickering (N. Y.), 5 N. E. 56	17
Owl Creek Coal Co. v. Golob, 210 Fed. 209	18
Seaboard Air Line Railway Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062	12, 17
Williams v. Georgia Southern & F. Ry. Co. (Ga.), 121 S. E. 700	16
Citation of this case in the court below: Bobo v. Northwestern Pac. R. Co., 19 P. (2d) 10	11, 19

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BRIEF FOR PETITIONER.

On Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District, Division One.

STATEMENT OF THE CASE.

This is an action brought by respondent to recover damages for the death of her husband which occurred while he was employed by petitioner in interstate commerce. The action is brought pursuant to the provisions of the statute of the United States commonly known as the Federal Employers' Liability Act.

Decedent had been employed for some six months before his death as a bridge tender on the railroad bridge of petitioner Northwestern Pacific Railroad Company, which bridge crosses a navigable waterway known as Petaluma Slough. His hours of employment were from 9:00 p. m. to 5:00 a. m. He came to work as usual at 9:00 p. m. on the night of February 3, 1930, and was never seen alive thereafter. Two weeks later his body was discovered in the water some miles from the bridge. There were no eye-witnesses to the accident. The only evidence concerning the decedent's activities on the night he disappeared was an entry in his handwriting in the log book on the bridge, showing that a steamer passed through at 1:20 a. m. What caused him to fall or jump into the water and whether he did fall or jump from the bridge is unknown. There was a steel stairway leading from a platform at the track level up to the control house at the top of the bridge. It is the theory of respondent that the decedent either in going up or coming down this steel stairway slipped and fell off the platform at the foot of the stairway into the water. Respondent charged negligence by petitioner in the maintenance of this steel stairway and platform (paragraph V of complaint, R. 2), the specific charges of negligence, as shown by the testimony of respondent's witnesses (R. 31, 32, 76, 77, 79), being (1) that the steps and platform at the bottom thereof were worn smooth and were slippery when wet; (2) that a single handrail only was maintained on each side of the stairway and platform which left sufficient space so

that a person falling or slipping on the stairs could slide under the handrail and into the water.

The evidence showed (R. 28; 29, 52, 63-64) that certain hairs similar to those on the sheepskin collar of a coat worn by the decedent and a spot resembling blood were found at or near the edge of the platform at the bottom of the stairs. One witness also testified that there was a bruise on the back of decedent's head when the body was recovered (R. 30). This evidence, it is claimed, was sufficient to show that the decedent fell off the bridge at that point. It is petitioner's contention that the evidence is insufficient to show that the decedent's fall—if it can be said he did fall—was caused by the alleged acts of negligence, to-wit, the slippery condition of the stairs and the absence of a lower handrail or toe-board.

The testimony discloses that there was maintained at one end of the bridge a small house where the bridge tenders customarily remained (see photograph R. 118-1), and that, whenever the bridge had to be opened to permit a vessel to pass through, the bridge tender was required to walk along the deck of the bridge to the steel stairway in question, go up the stairway, enter the control house, set the signals and open the draw. After the vessel had passed through and he had closed the draw he was required then to go down the stairway and inspect the track connections at each end of the span and then go back up the stairway to the control house and again set the signals so that trains could pass over the bridge. It thus required two trips up and two trips down the

stairway in question each time the bridge was opened for a vessel (R. 43-45-98).

It was also established that the steps and platform had been in the same condition as they were on the night of decedent's disappearance for some years prior thereto (R. 45), and that nearly every night, and particularly in the winter months, they were wet from dew (R. 57). It was also proved that it was necessary for the bridge tender to carry a lantern or flashlight with him at night while performing his work on the bridge (R. 49, 60). Upon these facts petitioner contends that decedent assumed the risk of using the stairway and platform, and was aware of the slippery condition of the steps when wet and of the single handrail.

SPECIFICATION OF ERRORS.

As indicated by the foregoing statement, petitioner urges a reversal of this case on two grounds:

1. That the evidence is insufficient to show that the death of decedent was proximately caused by any negligence on the part of petitioner;

2. That the evidence shows as a matter of law that decedent assumed the risk of using the stairway and platform of petitioner's bridge in the course of his employment.

NO CAUSAL CONNECTION HAS BEEN ESTABLISHED IN THIS CASE BETWEEN THE ALLEGED NEGLIGENCE OF THE PETITIONER AND THE DEATH OF DECEDENT.

It has been repeatedly held by this Court that, in order to sustain a recovery under the Federal Employers' Liability Act, plaintiff must not only prove negligence but prove causal connection between the negligence and the injury or death of the employee.

The record in this case is short and the evidence without conflict. The testimony upon which respondent relies in support of the allegations of negligence merely proved that the surface of the steps and platform of the steel staircase had been worn smooth and that the tops of the small iron knobs thereon had also been worn somewhat and were also smooth; that as a result of this smoothness the stairs and platform when wet were slippery (R. 31, 32, 76, 77, 79). It was further established that nearly every night in the winter time the stairs were wet with dew (R. 46), although there is no proof that the stairs were wet on the night decedent was last seen upon the bridge (R. 45). It was further charged that in other industries it was considered proper for stairways of this character to have double rails or even a toe-board along the sides of the steps or platform (R. 78-79). No one can say at what time or in what manner decedent fell or jumped from the bridge. It is left to conjecture whether he was seized with a dizzy spell or tripped or was caused to fall by some act of his own not connected with the slippery condition of the steps.

An almost identical situation is presented here as that passed upon by this Court in *Atchison, Topeka*

& Santa Fe Railway Co. v. Saxon, 284 U. S. 458, 52 Sup. Ct. 229, 76 L. Ed. 397, and *Chicago, Milwaukee & St. Paul R. R. Co. v. Coogan,* 271 U. S. 472, 46 Sup. Ct. 564, 70 L. Ed. 1041. In the former, the Court, speaking through Mr. Justice McReynolds, in 76 L. Ed. at page 398, says:

> "While employed as head brakeman by petitioner Railway Company and engaged in interstate commerce, J. W. Moore sustained fatal injuries at a New Mexico station. His personal representative obtained a judgment for damages, under the Federal Employers' Liability Act in a Texas court.
>
> The Court of Civil Appeals at El Paso reversed this, holding that the evidence failed to show the accident resulted from the carrier's negligence. The Supreme Court granted a writ of error, reversed the Court of Civil Appeals and affirmed the original judgment. It concluded that, viewing all the evidence, there was enough to show negligence and causal connection between this and the death.
>
> The matter is here by certiorari. The Railway sets up a claim under the federal statute which it has not heretofore had opportunity to submit for adjudication to any federal tribunal. The cause is one of a peculiar class where we have frequently been obliged to give special consideration to the facts in order to protect interstate carriers against unwarranted judgments and enforce observance of the Liability Act as here interpreted.
>
> Examination of the record convinces us that the Court of Civil Appeals reached the proper conclusion. We can find no evidence from which

it may be properly concluded that Moore's tragic death was the result of negligence by the Railway Company. As often pointed out, one who claims under the Federal Act must in some adequate way establish negligence and causal connection between this and the injury. New York C. R. Co. v. Ambrose, 280 U. S. 486, 74 L. Ed. 562, 50 S. Ct. 198; Atchison, T. & S. F. R. Co. v. Toops, 281 U. S. 354, 74 L. Ed. 899, 50 S. Ct. 281.

In the language of the Supreme Court the respondent 'recovered in the trial court on the theory that the deceased, while in the discharge of his duties as a brakeman, was running along by the side of the track of the Railway Company and while doing so with the purpose and intent of boarding one of the cars in the train, he stepped on or upon some soft area or hole in his pathway, and was thereby caused to fall and be run over and killed' (Tex.) 36 S. W. (2d) 230.

Nobody saw the accident; no one can say with fair certainty how it occurred. Consistently with the facts disclosed, it might have happened in one of several ways and without causal negligence by the petitioner. When last seen the deceased was running westwardly by the side of the train then moving in that direction. Across the pathway commonly used by trainmen, there was a slight depression—estimated to be four or five, or possibly six or eight, feet long and three feet wide—filled with small rock screenings. It was softer than other portions of the way—yielded to the foot. Eight or ten feet west of this witnesses found blood upon the rail.

Two hours after the accident a fourteen-year-old boy discovered the mark of a shoe in the

screenings. He said it 'was deeper than the footprint that I made, it looked as though somebody that was heavy or running had stepped in it. The front part of the foot was deepest.' There is no evidence—nothing but conjecture—to show that the deceased made this impression; and, even if he did, we cannot assume that by stepping there he was made to stumble and fall under the moving train.

What occasioned this distressing accident can only be surmised. It was necessary to show causal negligence in order to establish the respondent's right to recover. The evidence fails to meet this requirement.

The judgment below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

In *Chicago, Milwaukee & St. Paul Railroad Co. v. Coogan* (supra), the evidence showed that there was a bent or loosened pipe alongside of the defendant's railroad tracks at a point where the decedent was required to go to uncouple some cars. In some way while uncoupling the cars the decedent fell under the wheels and was killed. It was the contention of the plaintiff that the decedent slipped or tripped over the bent pipe and fell under the wheels. It was claimed that the defendant was negligent in so maintaining such a pipe alongside its tracks and that such negligence proximately caused the death of the decedent. To support this contention a mark on the outside of decedent's shoes was displayed for the purpose of attempting to show that he slipped upon the pipe. This Court, at page 566, says:

"The case was tried, and respondent supports the judgment, on the theory that, when the switch engine stopped after the last coupling, deceased went between the caboose and car to couple the air hose; that he stepped between the rails with his right foot, leaving his left foot outside the south rail and between it and the pipe line; that, stooping to reach the air hose his left foot slipped backward under the bent pipe; that, before he had time to make the coupling, the cars were started backward in the movement to clear the switch; that, when he attempted to straighten up, his left foot was caught under the pipe, and he was forced backward, run over, and killed. It follows that, unless the evidence is sufficient to warrant a finding that the death resulted from the catching of deceased's left foot under the bent part of the pipe line the judgment cannot be sustained. As there is no direct evidence, it is necessary to determine whether the circumstances are sufficient to warrant a finding of that fact. *Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved and not themselves presumed.* United States v. Ross, 92 U. S. 281, 284, 23 L. Ed. 707; Manning v. Insurance Co., 100 U. S. 693, 698, 25 L. Ed. 761. Assuming it was the duty of deceased to couple the air hose, it was necessary for him to go between the cars to do so. He was standing by the caboose when the first cut came in. The air hose coupling might have been made then or at any time after that. It was not made, and it is left to be inferred that he postponed effort in that direction until after all the switching had been done and until the engine had hold of the string of cars. And then it must be inferred that he went be-

tween the cars in the manner claimed—his right foot between the rails, leaving his left foot outside, where, it is argued, it was caught under the bent pipe.

The 'rounding depression' on the counter of the shoe is not sufficient to bridge the hiatus in the evidence. It is not shown when or how that depression was made. The condition of the shoe before the accident is not disclosed. A number of days elapsed before it was noticed, and it is not shown that in the meantime care was taken to keep it in the same condition or that the depression was not made after the accident. Even if the appearance of the shoe and other circumstances are sufficient to justify an inference that the depression might have been made by the bent pipe, it cannot be said that they constitute any reasonable support for a finding that it was so made. And, assuming that the depression on the shoe counter was made by contact with the bent pipe, there is nothing to indicate whether it was made at the time deceased was knocked down, or later while he was being dragged. But there is nothing to show that the pipe had any connection with the accident. * * *

When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture."

In each of the foregoing cases there were no eye-witnesses to the accident and what actually caused the decedent to fall was unknown. There was the

testimony relative to the footprint in the soft ground in the *Saxon* case and the mark on the shoe of the decedent in the *Coogan* case and it was claimed that this evidence was sufficient to show that the decedent in the *Saxon* case was caused to fall under the cars by reason of the soff ground, and in the *Coogan* case by reason of the bent pipe alongside the tracks. In the case at bar there is only the testimony relative to the sheep hairs, alleged blood spot and bruise on decedent's head to support the claim that he was caused to fall into the water by the slippery condition of the stairs and the absence of a lower railing. We see no distinction between these three cases. In each case it might be surmised that the decedent was caused to fall by the alleged negligent act of his employer, but this Court has repeatedly held that a judgment under this act cannot be supported solely by surmise and speculation.

It is clearly not sufficient, as the California District Court of Appeal seems to hold in this case, to merely prove negligence without proving that the decedent's death was due to such negligence. Not only was it incumbent on respondent to prove that the steps were unsafe, due to their slippery condition and single rail, but it was necessary to prove that the fall and death of decedent were proximately caused thereby.

In *Atchison, Topeka & Santa Fe Railway Co. v. Toops*, 281 U. S. 351, 50 Sup. Ct. 281, 74 L. Ed. 896, Mr. Justice Stone, at page 899, says:

> "But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained

of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer. Patton v. Texas & P. R. Co., 179 U. S. 658, 45 L. Ed. 361, 21 Sup. Ct. Rep. 275; New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367, 371, 62 L. Ed. 1167, 1170, 38 Sup. Ct. Rep. 535; St. Louis-San Francisco R. Co. v. Mills, 271 U. S. 344, 347, 70 L. Ed. 979, 983, 46 Sup. Ct. Rep. 520; Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 70 L. Ed. 1041, 46 Sup. Ct. Rep. 564; New York C. R. Co. v. Ambrose, decided February 24, 1930 (280 U. S. 486, ante, 562, 50 Sup. Ct. Rep. 198).

Even though we assume that in all the respects alleged the petitioner was negligent, the record does not disclose any facts tending to show that the negligence was the cause of the injury and death."

DECEDENT ASSUMED THE RISKS INCIDENT TO HIS EMPLOYMENT ON THE BRIDGE, INCLUDING THE USE OF THE STAIRWAY IN ITS THEN CONDITION.

This Court in the leading case of *Seaboard Air Line Railway Co. v. Horton,* 233 U. S. 492 (58 L. Ed. 1062, at 1070), with respect to the doctrine of assumption of risks, says:

"* * * On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be

present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into the account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, *unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.*" (Italics ours.)

We believe a clearer case of assumption of risk would be hard to find than the one presented here. The evidence shows that although decedent was only employed at night he had been working on the bridge continuously for six months before the accident; that his duties there were to open and close the bridge to permit boats to pass through; that in order to permit a boat to pass through it was necessary for him to traverse this stairway four times (R. 43-45). The testimony shows that when a boat whistled to go through the bridge the operator had to go up the stairs to the engine house on the top of the bridge and throw the semaphores and open the bridge. He

then had to go down the stairs and go to each end of the draw and see that the rails were in proper alignment. He then had to return up the stairs to the engine room, throw the semaphores to permit the trains to cross the bridge and then descend the stairs to reach the little house where he customarily remained. The testimony further showed that it was necessary for the operator to have either a lantern or a flashlight to accomplish this work, and that lanterns in good condition were furnished by the company for this purpose (R. 60-61). Clearly, therefore, the decedent had gone up and down this stairway hundreds of times before the night of the accident, during all of which time he carried a lantern or a flashlight. The stairs were somewhat steep and it was customary to hold on to the railing in going up or down them. How can it possibly be said that any person of the most limited intelligence would not have observed and known that there was only one railing on the stairs and platform? The decedent was a man of ordinary intelligence. The ordinary knowledge and experience in human affairs tells us without any question that he could not have traversed this stairway hundreds of times in the course of his duty without being aware of its physical characteristics. The same is true of the alleged slippery condition of the stairs. The testimony discloses that the stairs were slippery when wet. There is no evidence, however, that the stairs were wet at the time Bobo fell off the bridge. The testimony further discloses that nearly every night during the winter dew collected on the stairs, rendering them slippery (R. 47). No one cer-

tainly could have been more aware of this condition than the decedent. His hours of duty were from 9:00 p. m. to 5:00 a. m. and he was in a better position to observe the wetness of the steps than anyone else. Having gone up and down these stairs hundreds of times at night with a lantern and with his hand on the rail and with his feet on the alleged wet and slippery steps, it is to do violence to sound judgment or ordinary human experience to say that he was not aware of the fact that the stairs when wet were slippery and the danger incident thereto.

In *Butler v. Frazee*, 211 U. S. 459, 29 Sup. Ct. 136, 53 L. Ed. 281, at 285, this Court says:

> "* * * But where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence, and adequate experience; and all these elements of the problem appear without contradiction, from the plaintiff's own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly. Patton v. Texas & P. R. Co., 179 U. S. 658, 45 L. Ed. 361, 21 Sup. Ct. Rep. 275, and cases there cited. The case at bar falls within this class."

The rule laid down by this Court has been frequently applied by the Courts to situations similar to the one here. We quote briefly from a few of these decisions.

In *Biederman v. Montezuma Mfg. Co.* (Ga.), 116 S. E. 225, the syllabus reads:

> "There being no allegation to the contrary, it must be assumed that the servant (the plaintiff) was of ordinary intelligence, and that he was laboring under no physical defect or disability which rendered him incapable of appreciating the situation and knowing of the dangers incident to his employment. Thomas v. Georgia Granite Co., 140 Ga. 461, 79 S. E. 130. Construing the petition (as it must be construed) most strongly against the plaintiff, it appears that the defects upon the floor which caused him to slip and fall, and thus resulted in the injuries for which he sues, were patent and obvious, *and that he had equal means with the defendant, his master, of knowing thereof.* No cause of action is alleged, and the general demurrer of the defendant was therefore properly sustained."

In *Williams v. Georgia Southern & F. Ry. Co.* (Ga.), 121 S. E. 700, the syllabus reads:

> "Where a servant, while in the discharge of the duties of his employment, in descending from a lamp post with a heavy lamp upon his arm slips and falls upon an iron pipe, and is injured, any insecurity in the place by reason of any negligent maintenance of the post with the lowest step at a height of from four to five feet from the ground, or of an iron pipe protruding above the ground at the base of the post, is as obvious to the servant as to the master. This is true despite any assumption of the risk by the master in giving assurances of safety to the servant. Civil Code 1910, section 3131; Elliott v. Tifton Mill & Gin Co., 12 Ga. App. 498, 77 S. E. 667."

In *Marsh v. Chickering* (N. Y.), 5 N. E. 56, the syllabus reads:

> "Defendants furnished a ladder for plaintiff to use in their employ, in lighting gas-lamps in front of their building. He had notified them several times that it needed spiking, and they had promised to repair it, but did not do so, and, after lighting seven lamps, the ladder slipped, and he was injured. Held, that he could not recover; that the rule making the employer responsible for defective machinery, etc., does not extend to ordinary labor which only requires the use of implements with which the employe is perfectly familiar."

The California Court, in passing on this question in this case, said (R. 114):

> "While it is the rule under the statute that an experienced employee who knows the material conditions must be considered as appreciating the danger and assuming the risk, although at the time he may have forgotten the existence of the danger and the employer was negligent in allowing the danger to remain (Jacobs v. Southern Ry. Co., 241 U. S. 229), here, so far as shown, decedent had never ascended the stairway during the day time, nor was he aware of the conditions which made the structure dangerous."

It will be seen that the California Court wholly ignored that portion of the rule laid down in *Seaboard Air Line v. Horton* (supra) that, where the conditions and the risk are so obvious that an ordinarily prudent person, under the circumstances, would have observed and appreciated them, the employee is deemed to assume the same.

It may be suggested by respondent that the defense of assumption of risk was not pleaded in the answer. We merely wish to point out that all of the evidence upon which the defense of assumption of risk depends was adduced from respondent's own witnesses and, having herself disclosed that the decedent assumed the risk which caused his death, she cannot recover, even though it be held that the defense of assumption of risk was not pleaded in the answer.

C. B. & Q. R. Co. v. Shalstrom, 195 Fed. 725 (C. C. A. 8th Circuit), at page 729 the Court says:

> "The agreement of the servant to assume the ordinary risks of his employment and the extraordinary risks thereof that are known to and appreciated by him inheres in and is an inextricable part of his contract of employment, and when that is proved or admitted the assumption of these risks is proved, and no further pleading or proof on the part of the defendant is necessary to establish it. Malm v. Thelin, 47 Neb. 686, 66 N. W. 650; Glantz v. Chicago, B. & Q. R. Co., 87 Neb. 60, 127 N. W. 221; Evans Laundry Co. v. Crawford, 67 Neb. 153, 93 N. W. 177, 94 N. W. 814."

Owl Creek Coal Co. v. Goleb, 210 Fed. 209 (C. C. A. 8th Circuit), at page 216 the Court says:

> "It is, of course, conceded that, where the plaintiff's evidence discloses that he was guilty of contributory negligence, the defendant has a right to take advantage of such defense without specially pleading the same. Chicago, B. & Q. Ry. Co. v. Cook, 18 Wyo. 43-48, 102 Pac. 657; Chicago, G. W. Ry. Co. v. Price (C. C. A.), 97 Fed. 423-430, 38 C. C. A. 239; Lake v. Shenango Furnace Co. (C. C. A.), 160 Fed. 887, 88 C. C. A. 69."

We wish to further point out that the case was tried in the Court below on the theory that the defense of assumption of risk was in issue. It appears in the record before this Court (R. 105) that respondent herself proposed instructions in the lower Court on the issue of assumption of risk. It is a familiar rule that a request for instructions to a jury as to an issue is a waiver of the objection that such issue is not presented by the pleadings.

Baltimore etc. Railroad Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624.

This very point was passed on unfavorably to respondent's contention by the District Court of Appeal of the State of California in this case (R. 113).

In respondent's brief in this Court in opposition to the petition for writ of certiorari, the point was raised that, as no motion for directed verdict was made in the lower Court by petitioner, the sufficiency of the evidence may not be questioned on appeal. In our reply brief in support of the petition for writ of certiorari, we pointed out that all proceedings, prior to the petition for writ of certiorari to this Court, were conducted in the California State Courts and that, under the rules of practice therein, a motion for directed verdict is not required in order to raise the question of the sufficiency of the evidence on appeal.

Dated, San Francisco, California,
November 8, 1933.

Respectfully submitted,
W. H. ORRICK,
R. W. PALMER,
Attorneys for Petitioner.

Due service and receipt of a copy of the within is hereby admitted

this_____day of November, 1933.

_____

_____

Attorneys for Respondent.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No. 163

NORTHWESTERN PACIFIC RAILROAD COMPANY (a corporation),
Petitioner,

vs.

JOSEPHINE BOBO, as administratrix of the estate of Perry E. Bobo, deceased,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Subject Index

	Page
Statement of facts	1
Petitioner's questions	3
Questions involved:	2
1. Does not the petitioner ask this court to determine the weight of the proof since these matters turn upon no interpretation of the Act of Congress but involve simply an appreciation of the testimony and admissible inferences therefrom	2
2. Are these proper federal questions	2
3. Did not the petitioner by introducing testimony in its own behalf, after the denial of its motion for a nonsuit thereby waive any exception it may have taken to the refusal of the court below to grant a nonsuit	2
4. Did not the petitioner by submitting instructions touching the several points on which it relied, consent that the issues of fact be submitted to the jury	3
5. When an action at law is tried before a jury is their verdict subject to review on the question of insufficiency of the evidence to sustain it in the absence of a request for a peremptory instruction	3
6. Is not the question whether the deceased assumed the risk a question of fact, without exceptional features	3
7. Is not the burden upon petitioner to prove that the deceased assumed the risk	3
8. Is not the question of the establishment of negligence and causal connection between this and the injury complained of one of fact without exceptional features	3
Respondent's questions:	5
(1) The petitioner here asks this court to determine the weight of the proof since this matter turns upon no interpretation of the Act of Congress but involves simply an appreciation of the testimony and the admissible inferences therefrom	5
(2) The decision in the case at bar does not deprive the petitioner of any federal right under the statute and therefore these are not proper federal questions	6
(3) The record shows that petitioner, after having made the motion for a nonsuit introduced testimony in its defense. Petitioner's assignment of error that the	

Page

court denied its motion for a judgment of nonsuit, made at the conclusion of respondent's evidence, is of no avail to the petitioner, for the reason that, after denial of its motion it proceeded to introduce testimony in its own behalf..... 6

(4) The defendant assumed that the questions upon which it now predicates error would be submitted to the jury and submitted instructions touching the several points on which it relies. (R. 105, 106 and 107.) Petitioner cannot, therefore, now claim that the submission of these issues of fact to the jury was erroneous..... 6

(5) The right to attack a judgment on the grounds that the evidence is insufficient to support the judgment is lost by failure of the petitioner to request a peremptory instruction. It must be assumed that there was sufficient evidence to warrant the court below in permitting the jury to decide upon the evidence where there was no motion to direct a verdict..... 7

(6) The question whether the deceased assumed the risk is a question of fact. This court cannot as a matter of law declare that an employee assumed a risk where there is any substantial evidence that he did not..... 9

(7) The burden of proving employee assumed risk is upon the petitioner. The assumption of risk was a matter of defense to be invoked by the petitioner..... 11

(8) The question of the establishment of negligence and causal connection between this and the injury was one of fact. Direct or positive proof is not required to show that a negligent act or defect was the cause of an injury to or death of an employee engaged in interstate commerce. The manner and circumstances of the occurrence and all the accompanying surroundings, as proven may be examined in order to ascertain and determine whether or not an inference that negligent defect caused the death was a reasonable one, and if the plaintiff shows facts and circumstances from which negligence of the defendant and the causation of the accident by negligence may be reasonably and legitimately inferred, the cause should be submitted to the jury 12

Argument 13

Table of Cases and Statutes Cited

	Pages
A. T. & S. F. Ry. Co. v. Toop, 281 U. S. 351	14
Bank of Waterproof v. Fidelity & Deposit Co., of Maryland, 299 Fed. 478, 266 U. S. 618	9
Carolina, C. & O. R. Co. v. Stroup, 239 Fed. 75	12
Central Vermont R. Co. v. White, 238 U. S. 507	6
Chicago, E. I. Ry. Co. v. Collins Produce Co., 249 U. S. 186	5
Chicago Junction R. Co. v. King, 222 U. S. 222	17
Chicago, Milwaukee and St. Paul Ry. Co. v. Coogan, 271 U. S. 472	14
Choctaw O. & G. R. Co. v. Holloway, 191 U. S. 334	15
Cushman v. The Cliff House, 250 Pac. 575	8
Davidson S. S. Co. v. U. S., 205 U. S. 187	16
El Paso & S. W. R. Co. v. Vizard, 211 U. S. 608	5
Erie R. Co. v. Lindquist, 27 Fed. (2d) 98	9
Gardner v. Railroad Co., 150 U. S. 349	16
Great Northern R. Co. v. Knapp, 240 U. S. 466	11, 16
Hansen v. Boyd, 161 U. S. 397	7, 8
Hartford Life Insurance Co. v. Unsell, 144 U. S. 149	6
Looney v. Metropolitan R. R. Co., 200 U. S. 480	9
Mappin v. Atchison, Topeka and Santa Fe R. Co., 198 Cal. 733, 273 U. S. 729	11
McCabe and Steen Construction Co. v. Wilson, 209 U. S. 275	6
Minneapolis, St. P. & St. Ste. M. R. Co. v. Popplar, 237 U. S. 371	6
New York C. R. Co. v. Marcone, 281 U. S. 347	12
Railroad Co. v. Powers, 149 U. S. 43	15
Seaboard Air Line v. Pagett, 236 U. S. 668	6
Sigafus v. Porter, 179 U. S. 116	6
Sioux City & P. R. Co. v. Stout, 17 Wall. 657	16

	Page
Smellie v. Southern Pacific Co., 212 Cal. 561	13
Southern Pacific Co. v. Bogert, 250 U. S. 483	5
Southern Ry. Co. v. Puckett, 244 U. S. 571	4
Steil v. Holland, 3 Fed. (2d) 77	8
St. Louis-San Francisco Ry. Co. v. Bishop, 33 S. W. (2nd) 383, 283 U. S. 854	12
Texas & P. Ry. Co. v. Swearingen, 196 U. S. 51	17
Thomas v. Southern Pacific Co., 116 Cal. App. 126, 284 U. S. 689	11
Wilkinson v. Standard Accident Ins. Co., 180 Cal. 256	13
California Code of Civil Procedure, Sec. 629	7
Title 28 U. S. C. A. Sec. 344	5

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No. 163

NORTHWESTERN PACIFIC RAILROAD COMPANY (a corporation),
Petitioner,

vs.

JOSEPHINE BOBO, as administratrix of the estate of Perry E. Bobo, deceased,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF FACTS.

This was an action for damages for the death of Perry E. Bobo, brought by respondent as adminstratrix of the estate of Perry E. Bobo, deceased, under the Federal Employers' Liability Act, Title 45, U. S. Code, in the Superior Court of the State of California. By her complaint respondent charged petitioner with negligence. (R. 1, 2 and 3.) To this

complaint the petitioner filed an answer (R. 4, 5 and 6), in which it denied the allegations of negligence, dependency of respondent and of the minor children of said deceased and also that the respondent and minor children had been damaged by the death of said deceased. The petitioner in its answer did not set up the defense of assumption of risk. The matter was regularly set down for trial before a jury. At the close of the testimony in chief of respondent, the respondent made a motion for a nonsuit (R. 87), which after argument was denied by the trial Court. Petitioner after having made the motion for a nonsuit introduced testimony in its defense (R. 89 to 101) and submitted instructions touching the two points on which it relies now. (R. 105, 106 and 107.)

QUESTIONS INVOLVED.

General questions arising out of the issues here presented are:

(1) Does not the petitioner ask this Court to determine the weight of the proof since these matters turn upon no interpretation of the Act of Congress but involves simply an appreciation of the testimony and admissible inferences therefrom?

(2) Are these proper Federal questions?

(3) Did not the petitioner by introducing testimony in its own behalf, after the denial of its motion for a nonsuit thereby waive any exception it may have taken to the refusal of the Court below to grant a nonsuit?

(4) Did not petitioner by submitting instructions touching the several points on which it relied consent that the issues of fact be submitted to the jury?

(5) When an action at law is tried before a jury is their verdict subject to review on the question of insufficiency of the evidence to sustain it in the absence of a request for a peremptory instruction?

(6) Is not the question whether the deceased assumed the risk a question of fact, without exceptional features?

(7) Is not the burden upon petitioner to prove that the deceased assumed the risk?

(8) Is not the question of the establishment of negligence and causal connection between this and the injury complained of one of fact without exceptional features?

PETITIONER'S QUESTIONS.

Two questions are raised by the petitioner.

(1) Is it not incumbent upon one claiming damages under the Federal Employers' Liability Act to establish negligence and causal connections between this and the injury?

(2) Does not an employee engaged in interstate commerce assume the risk of the use of appliances, even though the same are defective, if such defective condition and the risk incident to their use are so obvious that an ordinarily prudent person under the circumstances must have observed and appreciated them?

It will appear from an examination of the record that all of the assignments of error are based upon exceptions which relate to the refusal of the Court below to grant the motion for a nonsuit made by petitioner at the close of the testimony in chief of respondent. (R. 112, fol. 145.)

Both of these questions were passed on by the Courts below. The trial Court acting on the motion for a nonsuit and upon the motion for a new trial. The District Court of Appeal also passed upon this question twice. Once on the main case and then upon a petition for a rehearing, and the Supreme Court of California, which is the highest Court of the State, passed upon these matters and denied petitioner's petition for a hearing. These matters were extensively argued and petitioner filed five briefs in the three lower Courts.

The opinion of the District Court of Appeal of the State of California (R. 111) does not show that the questions here presented were answered in the negative. The Court considered and passed upon these questions and held that they were questions of fact and that the facts reasonably presented a case for the jury and that the jury's conclusions were fairly supported by the evidence.

In the case of *So. R. Co. v. Puckett*, 244 U. S. 571, this Court said:

> "The Federal Supreme Court will not disturb the concurrent conclusions of the two State Courts in an action brought under the Federal Employers' Liability Act; that there was sufficient ground for attributing negligence to the

railway carrier because of the presence of large clinkers in the path along which an employee was called to pass in the course of his duty and over which he stumbled."

A verdict approved by the three lower Courts should be accepted as a conclusive finding upon the questions of fact involved:

Southern Pacific Co. v. Bogert, 250 U. S. 483;
Chicago and E. I. R. Ry. Co. v. Collins Produce Co., 249 U. S. 186;
El Paso and S. W. R. Co. v. Vizard, 214 U. S. 608.

RESPONDENT'S QUESTIONS.

(1) The petitioner here asks this Court to determine the weight of the proof since this matter turns upon no interpretation of the Act of Congress but involves simply an appreciation of the testimony and the admissible inferences therefrom.

Section 344, Title 28, U. S. C. A., which is Section 237 of the Judicial Code, confers appellate jurisdiction on this Court over final judgments and decrees in any suit in the highest Court of a State in which a decision in the suit could be had, where is drawn in question the validity of . . . a statute of the United States, and the decision is against its validity.

Questions of general law, raised in an action under the Federal Employers' Liability Act, which involve no construction of the Federal Statute, and neither directly nor indirectly affect any Federal right, will

not be reviewed on a writ of error from the Federal Supreme Court to a State Court.

Central Vermont R. Co. v. White, 238 U. S. 507.

(2) The decision in the case at bar does not deprive the petitioner of any Federal right under the Statute and therefore these are not proper Federal questions.

Seaboard Airline Ry. v. Padgett, 236 U. S. 668; *Minneapolis, St. P. & St. Ste., M. R. Co. v. Poplar,* 237 U. S. 371.

(3) The record shows that petitioner, after having made the motion for a nonsuit introduced testimony in its defense. Petitioner's assignment of error that the Court denied its motion for a judgment of nonsuit, made at the conclusion of respondent's evidence, is of no avail to the petitioner, for the reason that, after denial of its motion it proceeded to introduce testimony in its own behalf.

Hartford Life Ins. Co. v. Unsell, 144 U. S. 149.

In the case of *McCabe and Steen Const. Co. v. Wilson,* 209 U. S. 275, the Court says:

> "When the plaintiff rested the Court overruled a demurrer to the evidence * * * this ruling, however, cannot avail the defendant, whatever the defects then in the case for thereafter it proceeded to introduce testimony in its own behalf, and this waived any supposed error."

See also:

Sigafus v. Porter, 179 U. S. 116.

(4) The defendant assumed that the questions upon which it now predicates error would be submitted to

the jury and submitted instructions touching the several points on which it relies. (R. 105, 106 and 107.) Petitioner cannot therefore, now claim that the submission of these issues of fact to the jury was erroneous.

(5) The right to attack a judgment on the grounds that the evidence is insufficient to support the judgment is lost by failure of the petitioner to request a peremptory instruction. It must be assumed that there was sufficient evidence to warrant the Court below in permitting the jury to decide upon the evidence where there was no motion to direct a verdict.

Hansen v. Boyd, 161 U. S. 397.

The record shows that the petitioner upon the close of the evidence did not make a motion to direct a verdict in its behalf. Section 629 of the Code of Civil Procedure of the State of California reads as follows:

> "When a motion for a directed verdict, which should have been granted, has been denied and a verdict rendered against the moving party, the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict.
>
> A motion for judgment notwithstanding such verdict may also be made in the alternative form, asking therefor and reserving, if that be denied, the right to apply for a new trial. If the motion for a directed verdict or for judgment notwithstanding the verdict be denied, the trial court on motion for new trial or the appellate court on appeal from the judgment may order judgment

to be so entered when it appears from the whole evidence that a verdict should have been so directed at the trial; and when the motion is made in the alternative form, the court may also so order on appeal from the [*other*] denying such motion for judgment notwithstanding the verdict, whether a new trial was granted or denied."

The Courts of California have held that the section requires that a motion for judgment, notwithstanding the verdict, be made before the entry of the judgment thereon, and that as a condition to such motion, a motion for a directed verdict be made at the trial.

Cushman v. The Cliff House, 250 Pac. 575.

In the absence of a motion for a directed verdict, insufficiency of evidence to support the verdict is not presented on appeal.

In the case of *Steil v. Holland,* 3 Fed. (2nd) at page 777, the Circuit Court of Appeals of the Ninth Circuit say:

"When an action at law is tried before a jury, their verdict is not subject to review, unless there is absence of substantial evidence to sustain it, and even then it is not reviewable, unless a request has been made for a peremptory instruction and an exception taken to the ruling of the Court."

In the case of *Hansen v. Boyd,* 161 U. S. 397, the Court, speaking through Mr. Justice White says:

"Petitioner here asks this Court to determine the weight of the proof, and thus usurp the province of the jury. There was no motion made at the close of the evidence to direct a verdict,

and both parties therefore agreed to the submission of the issues to the consideration of the jury. In the absence of such a request, we must assume that there was sufficient evidence to warrant the Court in permitting the jury to draw the inferences proper to be deducted from the evidence in the case."

General verdict settles all disputed questions of fact, and unless tested by motion for peremptory instruction at close of evidence it also settles all undisputed questions of fact:

Bank of Waterproof v. Fidelity & Deposit Co. of Maryland, 299 Fed. 478—Cert. Denied, 266 U. S. 618.

(6) The question whether the deceased assumed the risk is a question of fact. This Court cannot as a matter of law declare that an employee assumed a risk where there is any substantial evidence that he did not.

Petitioner recites at length the evidence in the case upon which it relies in support of its said contention that the deceased assumed the risk, but what the deceased actually knew as to these defects cannot be known. In determining the question of assumption of risk, the injured employee will not be presumed to be negligent or to knowingly incur risk or danger of injury.

It is presumed that deceased proceeded with diligence and due care.

Looney v. Metropolitan R. R. Co., 200 U. S. 480;

Erie R. Co. v. Lindquist, 27 Fed. (2d) 98.

The presumption is a species of evidence and uniformly it has been held that unless the presumption is controverted by direct evidence the jury must give effect to the presumption and reach a result consistent with the view that the deceased proceeded with diligence and due care and did not knowingly incur risk or danger of injury. Where the state of the evidence is such that it is plausible to conclude either that there was or was not an assumed risk, the presumption comes into operation and determines the question in the negative unless there is additional evidence which is totally incompatible with the presumption.

The evidence introduced by the petitioner (R. 93) shows that in sixteen years there has never been an accident on the bridge and (R. 95) that there never was an accident taking place on the steps by anybody falling on the steps.

Two things are essential to make out the defense, to-wit:

1. Knowledge of the defective condition out of which the risk arose.

2. Appreciation of the risk arising therefrom.

The knowledge of conditions from which a risk arises which the doctrine calls for is immediate knowledge obtained from pure observation. It does not cover inferences or conclusions therefrom as to possible, or probable, or likely conditions.

Here there was no evidence to show that the deceased who worked on the bridge during the night time, knew that the knobs in line with the position

of his feet as he descended the steps, were worn smooth and that water would collect in the depressions in the steps and platform and that if he should slip thereon he would be precipitated into the water and come to his death by drowning. The deceased might be charged with contributory negligence in not having discovered the existence of the risk but could not be held to have assumed a risk which the evidence of the petitioner shows was not present.

When the deceased was confronted with the increased risk he had no such freedom of choice as to whether he would continue in or leave petitioner's service which is essential to call for the application of the doctrine of assumption of risk.

(7) The burden of proving employee assumed risk is upon the petitioner. The assumption of risk was a matter of defense to be invoked by the petitioner.

Mappin v. Atchison, Topeka, etc., R. Co., 198 Cal. 733—Cert. Denied 273 U. S. 729;

Thomas v. Southern Pacific Co., 116 Cal. App. 126—Cert. Denied 284 U. S. 689;

Great Northern R. Co. v. Knapp, 240 U. S. 466.

When Congress by this statute greatly broadened plaintiff's right to recover, preserving only one bar, i. e. (Assumption of Risk), the defendant must bring its case clearly within the bar so preserved; and that deceased's conduct should not be treated as assumption of risk, and so be allowed to defeat the rights of those dependent upon him, unless it can be clearly and distinctly so classified.

(8) The question of the establishment of negligence and causal connection between this and the

injury was one of fact. Direct or positive proof is not required to show that a negligent act or defect was the cause of an injury to or death of an employee engaged in interstate commerce. The manner and circumstances of the occurrence and all the accompanying surroundings, as proven may be examined in order to ascertain and determine whether or not an inference that negligent defect caused the death was a reasonable one, and if the plaintiff shows facts and circumstances from which negligence of the defendant and the causation of the accident by negligence may be reasonably and legitimately inferred, the cause should be submitted to the jury.

St. Louis & San Franci o Ry. Co. v. Bishop, 33 S. W. (2d) 383, cert. denied 283 U. S. 854.
Caroline C. & O. R. Co. v. Stroup, 239 Fed. 75.

This Court in *New York C. R. Co. v. Marcone,* 281 U. S. 347, held in a case where the deceased was killed by an engine which was being removed from a roundhouse by an hostler, there being no eye witness to the accident, that it was for the *jury* to say whether defendant exercised due care in moving the engine without a more specific and effective warning than that given by the hostler and whether failure to give such warning was the proximate cause of the death.

Petitioner argues in its petition that the deceased may have jumped off the bridge. There is a presumption, which is in the nature of evidence that a person is innocent of crime or wrong.

Where the deceased is found dead under circumstances that the death may have been due to suicide or to accident, the presumption is against suicide and

in favor of accident, following logically from the statutory presumption that a person is innocent of crime or wrong.

Wilkinson v. Standard Accident Ins. Co., 180 Cal. 256.

ARGUMENT.

Assuming the questions to be before the Court, without waiving the contention that they are not proper Federal questions, the following argument is submitted:

The record before this Court is incomplete in that the exhibit (R. 118B) was marked by a witness (R. 29) and the mark showing the place where he found the blood spot and the wool is not shown on this exhibit. Other witnesses testified from other exhibits and they too are not marked. The only exhibit attached to this record which shows the marks is plaintiff's exhibit No. 1C. (R. 118J.)

A presumption is a species of evidence and in California inferences in themselves constitute a recognized class of indirect evidence which a court or jury may not disregard. Unless a presumption is controverted by other evidence, the jury is bound to find in accordance with the presumption.

Smellie v. Southern Pacific Co., 212 Cal. at page 561.

Petitioner says:

"Under the decision of the District Court of Appeal of the State of California, respondent is permitted to recover damages under the Federal

Employers' Liability Act, without establishing negligence and causal connection between the negligence and the death of the decedent."

This statement is too broad. By referring to the facts and the holding in this case it will be found that the District Court of Appeal upheld respondent's contention that the decedent slipped from the platform and was drowned, the defects specifically alleged in respondent's complaint being the cause of his falling and ends its opinion with the following:

> "*We are satisfied that the facts reasonably presented a case for the jury and that its conclusions are fairly supported by the evidence.*"

The Court does not restrict the rule of law relied upon by petitioner. It cites in its decision, *A. T. & S. Fe Ry. Co. v. Toop*, 281 U. S. 351, and *Chicago, Milwaukee and St. Paul Ry. Co. v. Coogan*, 271 U. S. 472, both cases upon which petitioner relies and cites in its brief accompanying its petition for a writ of certiorari.

The Court further says:

> "Here the evidence was reasonably sufficient to show that the condition of the stairway and platform rendered their use unsafe at night and the physical facts fairly support the conclusions that the decedent fell therefrom and that his body passed under the railing into the water."

In the *Saxon* case and in the *Coogan* case, both cited by petitioner as authority, the defendants presented a motion for a directed verdict. In the case at

bar no motion for a directed verdict in its behalf was made by the petitioner.

By consent of the parties, the jury was taken to the bridge and had an ocular view of the place of the accident. They had a right to draw their own inferences and conclusions from the facts thus presented to them. What that inspection conveyed to the minds of the jury cannot be known from this record, therefore, this Court cannot and does not have the entire record before it. Evidence was offered in support of the contention of respondent and the weight of it under the law was for the jury to determine.

The Court should not reverse a judgment because of insufficient evidence to support a finding of fact by the jury based on the evidence and an ocular inspection of the place of accident, where the question of negligent construction and maintenance thereof was an issue in the case.

Chaetaye O. & G. R. Co. v. Holloway, 191 U. S. 334.

Where, in any case, it is a matter of judgment and discretion of sound inference, what is the deduction to be drawn from even undisputed facts, where different men, equally sensible and equally impartial, would make different inferences, the law commits such a case to the decision of the jury under instructions from the Court.

In the case of *Railroad Co. v. Powers*, 149 U. S. 43, Mr. Justice Brewer, in delivering the opinion of this Court, said:

> "It is well settled that, where there is uncertainty as to the existence of either negligence or

contributory negligence, the question is not one of law, but of fact, and to be settled by the jury; and this whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

See also:

Gardner v. Railroad Co., 150 U. S. 349.

Whether the act of deceased be assumption of risk or contributory negligence, it was for the jury to determine whether it would bar a recovery, and not for the Court. In the present case, there is nothing which appears that can be properly chargeable to the deceased as an assumed risk, and it is undoubtedly a question of fact whether the deceased assumed the risk even though the evidence is undisputed. It was for the jury to make a proper deduction from the evidence.

Sioux City and P. R. Co. v. Stout, 17 Wall. 657;
Davidson S. S. Co. v. U. S., 205 U. S. 187.

The burden is upon the petitioner to show that the deceased was chargeable with knowledge of the material conditions which were the immediate cause of his injury and must establish his appreciation of the dangers produced by the abnormal conditions and that he knew these conditions endangered his safety. It was for the jury to determine whether deceased's conduct showed assumption of risk or contributory negligence.

Great Northern R. Co. v. Knapp, 240 U. S. 466.

The Supreme Court is not called upon to scrutinize the entire record for the purpose of discovering

whether it may not be possible, by a minute analysis of the evidence to draw therefrom inferences which may possibly conflict with the conclusions of the Courts below as to the tendencies of the proof.

Chicago Junction R. Co. v. King, 222 U. S. 222.

The assignment of errors by petitioner do not show any repugnancy between the decision of the Court in this case and the applicable decisions of the United States Courts.

There was no denial to the petitioner of any right under the Federal Statute.

Here the trial Court gave every instruction requested by the petitioner and no complaint is made by petitioner as to the incorrectness of any instruction given by the trial Court.

The questions raised by the petitioner do not require any interpretation of the Act of Congress by this Court, but are questions of fact, which were properly submitted to the jury.

The question of whether there was sufficient evidence to allow the case to be submitted to the jury, rests with the trial Court. Here the trial Court upheld the verdict of the jury and the District Court of Appeal unanimously affirmed the trial Court and the Supreme Court of the State of California, denied a hearing. Therefore this Court should not disturb the concurrent conclusions of the State Courts upon the questions of fact involved herein.

Texas & P. R. Co. v. Swearingen, 196 U. S. 51.

Therefore it is respectfully submitted that the petition for a writ of certiorari should be denied and that respondent recover her costs.

Dated, San Francisco, California,
July 7, 1933.

ROBERT D. DUKE,
Attorney for Respondent.

LAWRENCE A. COWEN,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this ..... *day of July, 1933.*

.....

Attorneys for Petitioner.

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CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No. 163

NORTHWESTERN PACIFIC RAILROAD COMPANY (a corporation),
Petitioner,

vs.

JOSEPHINE BOBO, as Administratrix of the Estate of Perry E. Bobo, Deceased,
Respondent.

BRIEF FOR RESPONDENT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
The petitioner is seeking to have this Court revise the decision of the District Court of Appeal of the State of California in regard to facts	2
The record before this Court is incomplete	2
Specifications of error	4
The kind and weight of the evidence is sufficient to show petitioner's negligence was the proximate cause of decedent's death	4
The evidence does not show as a matter of law that the decedent assumed the risk	7
Conclusion	12

Table of Authorities Cited

	Pages
Alaska Packers Association v. Gover, 278 Fed. 927	8
Blodgett v. Preston, 118 Cal. App. 303	11
Burks v. A. T. & S. F. R. R. Co., 109 Pac. 1087	7
Camozzi v. Colusa Sandstone Co., 26 Cal. App. 74	5
Castonia v. Maine Cen. R. R. Co., 100 Atl. 601	5
Chicago & E. I. R. Co. v. Collins Produce Co., 249 U. S. 186	2
Choctaw O. & G. R. Co. v. Holloway, 191 U. S. 334	3
Cincinnati N. O. & T. P. Ry. Co. v. Hall, 243 Fed. 76	5
Cole v. Seaboard Airline Ry. Co., 154 S. E. 682, 282 U. S. 898	5
El Paso & S. W. R. Co. v. Vizard, 211 U. S. 608	2
Fortier v. Hogan, 115 Cal. App. 50	6
Great Northern R. Co. v. Knapp, 240 U. S. 466	10
Hughes v. A. T. & S. F. R. Co., 121 Cal. App. 271	11
Kanawaha & M. R. Co. v. Kerse, 239 U. S. 576	9
Kippenbrock v. Wabash R. Co., 194 S. W. 50	9
Kreitzer v. Southern Pacific Co., 38 Cal. App. 654	8
Looney v. Norfolk & Western, 125 S. E. 262	7
Massey v. Southern Pacific Co., 70 Cal. App. 77	3
McComb v. A. T. & S. F. R. Co., 110 Cal. App. 303	9
Mulligan v. Atlantic Coast Line R. Co., 88 S. E. 446	6
Northwestern Pacific R. R. Co. v. Fiedler, 52 Fed. (2d) 400	9
Pitt v. Southern Pacific Co., 121 Cal. App. 228	9, 11
Smellie v. Southern Pacific Co., 212 Cal. 561	6
Southern Pacific Co. v. Bogert, 250 U. S. 483	2
Summer v. Ann Arbor R. Co., 209 N. W. 184	9
Thomas v. Southern Pacific Co., 116 Cal. App. 126, 284 U. S. 689	5
Woodward v. Chicago R. I. & P. R. Co., 185 N. W. 978	5

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Respondent.

BRIEF FOR RESPONDENT.

The respondent's reply to the brief for petitioner respectfully shows:

The brief in opposition to the petition for writ of certiorari No. 163, October Term, 1933, is adopted as the main brief by this reference, and the present brief is supplementary thereto.

THE PETITIONER IS SEEKING TO HAVE THIS COURT REVISE THE DECISION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA IN REGARD TO FACTS.

In its opinion the District Court of Appeal concluded that the evidence was reasonably sufficient to show that the condition of the stairway and platform rendered their use unsafe at night, and the physical facts fairly supported the conclusion that the decedent fell therefrom and that his body passed therefrom into the water, and that the facts reasonably presented a case for the jury and that its conclusions are fairly supported by the evidence. (R. 114.)

These conclusions are plainly conclusions of fact. Petitioner now seeks to have this Court examine the facts upon which these conclusions are based. No rule of appellate practice is better settled than the rule that this Court will not determine the accuracy of the facts and that a verdict approved by the lower courts will be accepted as a conclusive finding upon the questions of fact involved.

Southern Pacific Co. v. Bogert, 250 U. S. 483;
Chicago & E. I. R. Co. v. Collins Produce Co., 249 U. S. 186;
El Paso & S. W. R. Co. v. Vizard, 211 U. S. 608.

THE RECORD BEFORE THIS COURT IS INCOMPLETE.

By consent of the parties the jurors were taken to the bridge and had an ocular view of the place of the accident. They had the right to draw their own inferences and conclusions from the facts thus presented to them. What that inspection conveyed to

the minds of the jury can not be known from this record, therefore, this Court can not and does not have the entire record before it. From the physical examination made by the jury at the place of the accident they had the right to resolve against the petitioner the question of negligence and the question of whether or not the negligence of the petitioner was the proximate cause of the death, and by their verdict the jurors have determined that if there had been proper guard-rails on the platform surrounding the steps the decedent would not have fallen off the platform into the water and that the negligence of petitioner was the proximate cause of the death of the decedent.

Massey v. Southern Pacific Co., 70 Cal. App. 77.

Respondent specifically alleged that the decedent slipped from the stairway or platform and was drowned. Evidence was offered in support of the contention of respondent and the weight of it, under the law, was for the jury to determine. The Court should not reverse a judgment because of insufficient evidence to support a finding of fact by the jury based on the evidence and an ocular inspection of the place of the accident, where the question of negligent construction and maintenance thereof was an issue in the case.

Choctaw O. & G. R. Co. v. Holloway, 191 U. S. 334.

SPECIFICATIONS OF ERROR.

Two questions are raised by petitioner: (1) that the evidence is insufficient to show that the death of decedent was proximately caused by any negligence on the part of petitioner; (2) that the evidence shows as a matter of law that decedent assumed the risk of using the stairway and platform of petitioner's bridge in the course of his employment.

THE KIND AND WEIGHT OF THE EVIDENCE IS SUFFICIENT TO SHOW PETITIONER'S NEGLIGENCE WAS THE PROXIMATE CAUSE OF DECEDENT'S DEATH.

Petitioner contends that respondent in this case has charged only two specific acts of negligence, that is, that the steps and platform at the bottom thereof were worn smooth and were slippery when wet; and, that a single handrail only was maintained on each side of the stairway and platform which left sufficient space so that a person falling or slipping on the steps would slide under the handrail into the water. Respondent alleged and proved that the decedent came to his death by drowning, and that the petitioner was negligent in the maintenance of the bridge, steps and approaches thereto, and that the proximate cause of the death of decedent *by drowning* was the negligence of petitioner in the maintenance of the bridge, steps and approaches thereto, together with the failure of petitioner to install a proper guard-rail thereon. IF THERE HAD BEEN A PROPER GUARD-RAIL ON THIS BRIDGE THE DECEDENT WOULD NOT HAVE BEEN PRECIPITATED INTO THE WATER.

The respondent had the right to rely upon any one of the alleged acts of negligence as the proximate cause of the death, or upon all of said acts operating together or concurrently in so causing the damage.

Camozzi v. Colusa Sandstone Co., 26 Cal. App. 74.

A master owes his servants the non-delegable duty to exercise reasonable care to provide a safe place in which to work, which care may not be relaxed, for its exercise is a continuing duty, whenever the circumstances demand it.

Cincinnati N. O. & T. P. Ry. Co. v. Hall, 243 Fed. 76;

Thomas v. Southern Pacific Co., 116 Cal. App. 126 (Cert. denied, 284 U. S. 689).

In furnishing a place wherein to work, the employer must exercise due "care," i. e., care which exigencies of work reasonably demand.

Cole v. Seaboard Airline Ry. Co., 154 S. E. 682 (Cert. denied, 282 U. S. 898).

It is not necessary that there be direct proof of a causal connection between the accident and the negligence charged, it being sufficient if the proven facts and circumstances are such as to justify a reasonable inference that the negligence of the master was the proximate cause of the accident.

Woodward v. Chicago R. I. & P. R. Co., 185 N. W. 978 (Iowa);

Castonia v. Maine Cen. R. R. Co., 100 Atl. 601.

It is not essential that in establishing liability and proving negligence that there must be eye-witnesses

to the transaction to establish such fact, or be direct, for the evidence can be either direct or circumstantial. The respondent assumed the burden of furnishing evidence, but the proof may be either by direct or circumstantial evidence.

Mulligan v. Atlantic Coast Line R. Co., 88 S. E. 446.

The petitioner recites at length the evidence in the case upon which it relies in support of its said contention that the evidence is insufficient to show that the death of decedent was proximately caused by any negligence on the part of petitioner, BUT IT DOES NOT TAKE INTO CONSIDERATION THE EVIDENCE RECEIVED BY THE JURY BY INSPECTION AT THE PLACE OF THE ACCIDENT, OR, THE PRESUMPTION IN THE CASE, because a presumption is evidence and may in certain cases outweigh positive evidence adduced against it.

Smellie v. Southern Pacific Co., 212 Cal. 561;
Fortier v. Hogan, 115 Cal. App. 50.

Pages 1, 2, 3, 4 and a part of 5 of petitioner's brief are concerned with the statement of facts and a large portion of its brief is devoted to an attempt to show wherein the evidence is insufficient to show that the death of decedent was proximately caused by the negligence of petitioner, but nowhere does it point out wherein the deficiency lies—it merely claims that the evidence is insufficient! This is not proper in a brief of this kind and calls for no reply, because, as the District Court of Appeal in this case says:

"Where there is uncertainty as to the existence of negligence, whether such uncertainty arises from a conflict of testimony, or because, the facts

being undisputed, fair-minded men might honestly draw different conclusions therefrom, the question is one of fact for the jury." (R. 114.)

Petitioner also overlooks the fact that inferences naturally drawn from facts which are actually established by proof are entitled to be considered as a part of the evidence. The evidence in the case at bar justified an inference that the deceased had slipped and fallen on the steps which had been permitted to get out of repair, and that the failure of petitioner to place adequate guard-rails on the platform surrounding the steps caused the decedent to slip into the water and come to his death by drowning.

Burks v. A. T. & S. F. R. R. Co., 109 Pac. 1087 (Kansas).

See also:

Looney v. Norfolk & Western, 125 S. E. 262 (Virginia).

THE EVIDENCE DOES NOT SHOW AS A MATTER OF LAW THAT THE DECEDENT ASSUMED THE RISK.

The petitioner contends that the decedent assumed the risk incident to his employment on the bridge, including the use of the stairway and platform in their then condition. The stairway in question contained some 35 steps and was pitched at an angle of 48½° to the horizontal. The vertical distance from one step to the other was 9 inches, and the distance from the back of each step to the front of each step was 8 inches. THE STAIRWAY WAS ON THE OUT-

SIDE OF THE BRIDGE UPRIGHTS AND OVER THE WATER. On the platform at the foot of the steps there was an iron handrail 3 feet and 1 inch above the steps and platform, and there was a space from the bottom of the rail to the platform of approximately 2 feet 10 inches. There was a signal light on the top of the bridge, and NO LIGHT OF ANY KIND ON THE BRIDGE OR STEPS. The stairway was a part of the bridge. The necessity for sound construction and timely inspection in such a structure is far greater in view of its location than an ordinary stairway. Petitioner knew that it was necessary for a bridge tender to move hurriedly up and down the stairway when a boat signaled for the bridge to open and to close the bridge after the boat had proceeded through the draw of the bridge. The testimony discloses that no inspection was ever made of the bridge prior to the happening of the accident. It was the duty of the petitioner to inspect the bridge, yet it contends that it was not dangerous and bases its contention upon the fact that the two bridge tenders testified that there had never been an accident on the bridge. (R. 94 and R. 95.)

In *Alaska Packers Association v. Gover*, 278 Fed. 927, the Court said:

> "A ladder 25 feet long, permanently fixed to the side of a building having rungs nailed in mortises in the perpendicular side pieces, is not a simple tool, risks of defects in which is assumed by a workman required to use it, but a part of the place to work and it is the duty of an employer to exercise reasonable care to see

that it is properly inspected and kept in safe condition."

The question of decedent's knowledge and assumption of risk was properly submitted to the jury.

Kreitzer v. Southern Pacific Co., 38 Cal. App. 654;

McComb v. A. T. & S. F. R. Co., 110 Cal. App. 303.

The burden of sustaining the contention, including the facts of decedent's knowledge and appreciation of the existence of the danger, is upon the petitioner.

Kanawaha & M. R. Co. v. Kerse, 239 U. S. 576.

The burden of proving an employee assumed the risk was upon defendant railroad.

Northwestern Pacific R. R. Co. v. Fiedler, 52 Fed. (2nd), 400;

Pitt v. Southern Pacific Co., 121 Cal. App. 228.

The rule that a railroad employee must look out for himself applies only when the act causing injury was one naturally to be expected.

Kippenbrock v. Wabash R. Co., 194 S. W. 50 (Mo.).

The defense of assumption of risk can not be made where injury occurs by a single act creating a sudden emergency without warning.

Summer v. Ann Arbor R. Co., 209 N. W. 184 (Mich.).

The burden is upon the petitioner to show that the deceased was chargeable with knowledge of the mate-

rial conditions which were the immediate cause of his injury and must establish his appreciation of the danger produced by the abnormal conditions, and that he knew that these conditions endangered his safety. It was for the jury to determine whether deceased's conduct showed mere assumption of risk or contributory negligence.

Great Northern R. Co. v. Knapp, 240 U. S. 466.

The risk which an employee assumes is of two kinds—ordinary and extraordinary. Ordinary risks are those that are normally incident to the occupation in which an employee voluntarily engages. But risks of another sort not naturally incident to the occupation may arise out of the failure of the carrier to exercise due care with respect to providing a safe place to work and suitable and safe appliances for the work. These are known as extraordinary risks. An employee has the right to assume that his employer has exercised due care for his safety. He is not to be treated as assuming these extraordinary risks arising from defects due to the negligence of the employer unless he has *knowledge* of them and the dangers arising therefrom. The knowledge of conditions from which a risk arises which the doctrine calls for is immediate knowledge obtained from pure observation. It does not cover inferences or conclusions therefrom as to the possible, or probable or likely conditions.

In determining the question of assumption of risk, the injured employee will not be presumed to be negligent or to knowingly incur risk or danger of

injury, and this presumption is in itself evidence and may even be sufficient to outweigh positive evidence to the contrary.

Pitt v. Southern Pacific Co., 121 Cal. App. 228;
Hughes v. A. T. & S. F. R. Co., 121 Cal. App. 271;
Blodgett v. Preston, 118 Cal. App. 303.

It is undoubtedly a question of fact whether the employee assumed the risk, even though the evidence is undisputed. It was for the jury to make a proper deduction from the evidence, and as the District Court of Appeal in its opinion says:

> "We are satisfied that the facts reasonably present a case for the jury and that its conclusions are fairly supported by the evidence."
> (R. 114.)

The record does not disclose any evidence whereby petitioner attempted to offer any proof whatever upon the question of extraordinary risks and hazards caused by the master's negligence. It does not raise the defense of assumption of risk in its answer. This may be considered as waived, however, in any event if the defense of assumption of risk may be said to be an issue in this case. There can be no question but that the burden of proof was upon the petitioner and it was not enough for petitioner to attempt to show bare knowledge. In order to raise the question it must go further and show that the decedent knew and appreciated or must be charged with knowledge and appreciation of the hazards. What condition confronted the decedent on the night he came to his

death cannot be known. In determining this question the deceased will not be presumed to be negligent. The matter was submitted to the jury for its decision, and no complaint or claim is made that the instructions of the Court were incorrect.

Both the trial Court and the District Court of Appeal recognize that if assumption of risk by the decedent was made out it would bar recovery under the act. The question was one of fact to be submitted to the jury, and the decision of the jury and the judgment of the three lower Courts based thereon should be binding and determinative of this issue.

CONCLUSION.

It is, therefore, respectfully submitted that the assignments of error by petitioner do not show any repugnancy between the decision of the Court in the case at bar and the applicable decisions of the United States Supreme Court; that there was no denial to the petitioner of any right under the Federal statute because the questions raised by petitioner do not require any interpretation of the Act of Congress by this Court, but were questions of fact which were properly submitted to the jury.

The question of whether there was sufficient evidence to allow the case to be submitted to the jury rests with the trial Court, and every intendment should be indulged in favor of the verdict because the evidence in this case leads to the conclusion that the proximate cause of the death of the decedent w

the negligence of the petitioner and that petitioner failed to establish that the death of decedent by drowning was caused by a risk assumed by said decedent.

Dated, San Francisco, California,
December 1, 1933.

Roscoe D. Duke,
Attorney for Respondent.

Lawrence A. Cowen,
Of Counsel.

Due service and receipt of a copy of the within is hereby admitted

this_____day of December, 1933.

_____

Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 163.—October Term, 1933.

Northwestern Pacific Railroad Company, Petitioner, *vs.* Josephine Bobo, as Administratrix of the Estate of Perry E. Bobo, Deceased.	On Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District, Division One.

[January 8, 1934.]

Mr. Justice McReynolds delivered the opinion of the Court.

Claiming under the Federal Employers' Liability Act, respondent sued the petitioner in the Superior Court, Marin County, California, for damages consequent upon the death of her husband, Perry E. Bobo. She maintains that this was the proximate result of the Company's negligence while it employed him.

The complaint alleged—

> That on February 4, 1930, the decedent Bobo was a tender of the bridge at Grand View, California, a portion of petitioner's road; "it was part of said deceased's duties as such bridge tender to uncouple the tracks and, connections on said bridge, work the semaphore signals and, open and close the draw of said bridge; that in the course of the performance of said duties said deceased was required to go to the building on the top of said bridge for the purpose of using the mechanism located in said building which was necessary to be used in the opening and closing of said bridge and to work the semaphore signals; that on said last mentioned date it became the duty of said deceased in the discharge of his duties as such bridge tender to adjust the semaphore signals and that while returning from his duties he slipped upon the steps leading up to said building and was precipitated into the waters of the Petaluma Creek and came to his death.
>
> "That said defendant was careless and negligent in this, that it failed to provide said deceased a safe place to do the

work required of him; that said bridge was installed in an improper manner so as to render the same unsafe and dangerous; that the steps leading to the building on the top of said bridge were constructed, installed, used and maintained by said defendant in an improper, faulty and defective manner so as to render them unsafe and dangerous; that it failed to install proper guard rails on said steps and the approaches thereto so as to protect persons using said bridge and said steps; that it permitted said steps to become uneven so that they sloped and permitted water to collect in depressions on said steps on which said deceased slipped and fell."

A jury found in favor of the respondent and assessed the damages at $12,500. Judgment thereon was affirmed by the District Court of Appeal. The Supreme Court refused to hear the cause and it comes here by certiorari.

The petitioner maintained that there was no evidence to show the death resulted from its negligence, also that Bobo assumed the risk, and asked for an instructed verdict. The trial court wrongly, we think, refused this request.

The evidence shows that the deceased began his service as bridge tender in August, 1929, and continued until he disappeared February 4, 1930. His working hours were from 9:00 P. M. to 5 A. M. His duty was to open the draw for the passage of boats, then close it, see that the rails were properly aligned, and set the lights. The draw was operated through an engine housed 26 feet above the rails. When not actually engaged Bobo ordinarily remained in a shanty near the end of the bridge. To reach or return from the engine he went up or down a flight of 35 iron steps which ran along the outside of the bridge structure, pitched at 48½ degrees to the horizontal. These steps were guarded by a single rail on either side. They were 21 inches long and 8 inches wide. He was furnished with a proper lantern to light the way.

February 3, 1930, at 9:00 o'clock Bobo went to work. He was last seen alive at 11:00 o'clock; an entry in the log book shows that he opened the draw the next morning at 1:30. Two weeks thereafter his body, badly decomposed, was found in the water some distance from the bridge. To determine the cause of death from an examination of this was impossible.

When last seen the deceased wore a coat with sheepskin collar. A few hours after his disappearance witnesses discovered on the edge of the iron platform at the foot of the stairway what seemed to be small pieces of wool; also, a little spot which looked like blood. Some of the steps and the platform had become smooth through use during fifteen years or more. During the winter dew often accumulated on these during the night and caused them to become quite slippery. Also, witnesses stated, the stairs and platform were not adequately guarded—the single rail was not enough and was placed too low.

Respondent's theory is that while properly discharging his duties, Bobo slipped, fell into the water, and drowned.

Our decisions clearly show that "proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer." *Atchison, Topeka & Santa Fe Ry. Co.* v. *Toops*, 281 U. S. 351, 354, 355; *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Coogan*, 271 U. S. 472; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Saxon*, 284 U. S. 458.

If petitioner was negligent in respect of the stairway and platform, there is nothing whatsoever to show that this was the proximate cause of the unfortunate death. So to conclude would be pure speculation; and for reasons heretofore sufficiently elaborated judgments based upon verdicts so arrived at cannot be permitted to stand.

Regarding the defense based upon assumption of the risk, the District Court of Appeal said—"Here, so far as shown, decedent had never ascended the stairway during the day time, nor was he aware of the conditions which made the structure dangerous. The complaint described the defects which were alleged to have caused the injury; and defendant contends that these allegations show that the cause of death was a risk assumed by decedent, and that consequently no cause of action was stated, citing *Bresette* v. *E. B. & A. L. Stone Co.*, 162 Cal. 74; but, as pointed out, the evidence was insufficient to show that decedent knew of the defects de-

scribed, or that the conditions under which he was employed were such that he must have known them."

With this conclusion we cannot agree. The deceased had gone up and down these open stairs very many times from August to February. He had a proper lantern by the light of which he could easily see the alleged defects. He must have been aware that moisture frequently accumulated. Also, often during the summer and early autumn there was adequate sunlight before five o'clock A. M. to disclose the real conditions. No suggestion is made of any complaint to the Company concerning the stairs or platform.

We think the record discloses enough to show that the decedent assumed any alleged risk. *Seaboard Air Line Ry. Co.* v. *Horton*, 233 U. S. 492; *New Orleans & N. E. R. R. Co.* v. *Harris*, 247 U. S. 367, 371; *Chesapeake & Ohio Ry. Co.* v. *Kuhn*, 284 U. S. 44, 46, 47.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.